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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 79-6630

ALICE C. ROCHE, ET AL, Appellant,

V.

BIG MOOSE OIL FIELD TRUCK SERVICE, ET AL, Appellee

Appeal from the Supreme Court of Louisiana

Statement as to Jurisdiction

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BIG MOOSE OIL FIELD TRUCK SERVICE, ET AL, Appellee

Appeal from the Supreme Court of Louisiana

Statement as to Jurisdiction

Opinion Below

The Supreme Court of Louisiana issued its opinion in this case on February 15, 1980. The opinion is not yet reported and has been reprinted at pages 31-47 to the Joint Appendix filed herewith. Application for Rehearing was denied in this case on April 7, 1980 as noted in the Appendix, infra page 48.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(2)[1], this being an appeal which draws into question

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[1] "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

...(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

the validity of LSA - Civil Code, Article 2315 infra, page on the ground that it is repugnant to the Constitution of the United States.

Appellant, Alice C. Roche, instituted suit in the Fifteenth Judicial District Court, State of Louisiana on December 3, 1976, individually and as natural tutrix of her two (2) minor twin children, William and Dawn Roche, as the result of the wrongful death of Joseph D. Roche. Appellees filed an exception as to the right of the two (2) minor children to bring a wrongful death action pursuant to LSA - Civil Code Article 2315, since on the date that Joseph D. Roche was killed, the two (2) children were in the process of being adopted by Appellant, Alice C. Roche, and the decedent, Joseph D. Roche, and a final adoption decree had not yet been rendered by the State District Court.

This decision was affirmed by the Third Circuit, Court of Appeal, State of Louisiana, as reported at 371 So. 2d 1374 (1979) and as set forth in the Appendix, infra pages 20-30.

On February 15, 1980, the Supreme Court of Louisiana affirmed the denial of the minor children's right to recover for Mr. Roche's wrongful death. Application for Rehearing was denied on April 7, 1980. Timely notice of appeal to this Court was filed in the Supreme Court of Louisiana on May 5, 1980.

As the Supreme Court of Louisiana rejected Appellant's challenge to LSA - Civil Code Article 2315, this matter is appropriately brought to this Court by appeal. See Levy vs. Louisiana, 88 S. Ct. 1509 (1968).

In the event that the Court does not consider appeal the proper mode of review, Appellant requests that this application for an appeal be regarded and acted upon as a petition for writ of

certiorari pursuant to 28 U.S.C., Section 2103.[2]

Constitutional and Statutory Provisions Involved

This case involes the Fourteenth Amendment to the Constitution of the United States.[3]

This case also involves LSA - Civil Code Article 2315 which states:

> "Liability for acts causing damage; survival of action - Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.
>
> "The right to recover damages to property caused by an offense or quasi offense is a property right which, on the death of the obligee, is inherited by his legal, instituted, or irregular heirs, subject to the community rights of the surviving spouse.

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[2]"Appeal from State court or from a United States court of appeals improvidently taken regarded as petition for writ of certiorari

"If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a State, or of a United States court of appeals, in a case where the proper mode of a review is by petition for certiorari, this along shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken. Where in such a case there appears to be no reasonable ground for granting a petition for writ of certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs."

[3]"Amendment 14 - Section 1. Citizens of the United States.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children; (2) the surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and (3) the surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child or parent surviving. The survivors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the deceased. A right to recover damages under the provisions of this paragraph is a property right which, on the death of the survivor in whose favor the right of action survived, is inherited by his legal, instituted or irregular heirs, whether suit has been instituted thereon by the survivor or not.

"As used in this article, the words 'child', 'brother', 'sister', 'father', and 'mother', include a child, brother, sister, father and mother, by adoption, respectively."

Question Presented

Whether LSA - Civil Code Article 2315, which deprives individuals of the right to recover for the wrongful death of another individual on whom they were totally dependent for their subsistence, violates the Equal Protection Clause of the Fourteenth Amendment.

Statement of the Case

On August 10, 1968, Appellant, Alice C. Roche, married the decedent, Joseph D. Roche. There were no natural children born of this union. However, on April 21, 1972, two (2) minor children, namely, William Donald Robinson and Dawn Rachelle Robinson, were placed in foster care in the home of Appellant, Alice C. Roche, and Joseph D. Roche, by the Louisiana Health and Human Resources Administration, Division of Family Services, and the two (2) children have remained in the Roche home since that time.

The aforementioned minor children were born as twins on January 17, 1969, in Lake Charles, Louisiana, to their natural

unwed mother who subsequently abandoned the children. Following the placement of William and Dawn in the Roche home by the Division of Family Services, the Fourteenth Judicial District Court, State of Louisiana, issued an Order on May 31, 1974, declaring the twins to be legally abandoned and placing the children in the custody of the Agency.

On November 19, 1975, Appellant, Alice C. Roche, and Joseph D. Roche applied for the adoption of the aforenamed minor children in the Juvenile Court of the Fifteenth Judicial District Court, State of Louisiana. The Division of Family Services filed its confidential report on the adoption request of Mr. and Mrs. Roche on December 19, 1975. The Final Decree of Adoption of William and Dawn (Robinson) Roche unto Mr. and Mrs. Roche was granted in this matter on January 5, 1976.

On December 3, 1975, between the filing of the petition for adoption and the rendition of the final Adoption Decree, Joseph D. Roche was killed while employed by Appellee, Fred Wilson Drilling Company, Inc. At the time of his death, Mr. Roche was employed as a roustabout on an oil, gas and/or mineral well in Evangeline Oil Field, Acadia Parish, Louisiana. While working at the aforementioned rig on December 3, 1975, Joseph D. Roche was instructed by an employee of Appellee, Big Moose Oil Field Truck Service, Inc., to assist in the unloading of drill collars on the well site. Mr. Roche was violently crushed by these drill collars during the unloading process, causing his death.

Appellant, Alice C. Roche, instituted suit in this matter against Big Moose Oil Field Truck Service, Inc., Gardner LaCombe, Reliance Insurance Company, David Fite, L. J. Guidroz, Clyde Johnson, Fred Wilson, Liberty Mutual Insurance Company and Joe Doe,

as defendants, liable jointly and in solido for the wrongful death of Joseph D. Roche.

Before a trial on the merits could be heard in this case, Appellees filed an exception in the district court on the basis that LSA - Civil Code Article 2315 did not provide a right of action to the two (2) minors since the adoption decree in this case had been issued after Mr. Roche's death.

The trial court sustained the exception and on appeal, the Third Circuit, Court of Appeals, State of Louisiana, affirmed the decision. The Louisiana Supreme Court held on February 15, 1980 that this denial of a right of action on behalf of the two (2) minor children for the wrongful death of Mr. Roche pursuant to LSA - Civil Code Article 2315 was not discriminatory or unconstitutional.

How the Federal Questions were Raised and Decided Below

Appellant has consistently challenged the discriminatory application of LSA - Civil Code Article 2315 from the district court hearing in this matter through both stages of the State Appellate Judicial System. At each stage of these proceedings, Appellant's attack of this statute was struck down.

The majority of the Louisiana Supreme Court squarely rejected Appellant's contention. However, the dissenting opinion strongly attacked the majority's discriminatory application of LSA - Civil Code Article 2315 with the following language:

> "Because of the wrongful act of another, the children in the present case were injured. They were deprived of support, love and affection, and of a father. Although they may not fit technically within any of the present categories of 2315 I believe that an examination of the purpose of the statute would require that person who caused the damage to repair it.
>
> "Moreover, the majority's interpretation of Article 2315 renders it unconstitutional.

"Although I appreciate the difficulty in conceptualizing a class including the children, it seems to me that dependent minors undergoing virtually certain adoption, absent the death of the adoptive parent, do form a legitimate category deserving of equal protection of the laws -- at least as deserving as independent major illegitimate children who may have never known their deceased parent. If the majority's interpretation of Article 2315 is correct, it arbitrarily, capriciously and unreasonably discriminates against the prospective adopted children because of their birth, La. Const. Art. 1, § 6, there being no rational basis to support such discrimination."

The Federal Questions are Substantial

As construed by Louisiana's highest court, LSA - Civil Code Article 2315 deprives a minor child from recovering for the wrongful death of an individual upon whom the minor is socially and economically dependent upon for subsistence. This invidious discrimination raises serious questions under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

This Honorable Court has been extremely sensitive when protecting rights of dependent minor children. In Levy vs. Louisiana, 88 S. Ct. 1509 (1968), this Court held "that denial to illegitimate children of the right to recover for the wrongful death of their mother on whom they were dependent constituted invidious discrimination against them." The Levy decision also concerned a challenge to LSA - Civil Code Article 2315. After applying the Equal Protection Clause of the Fourteenth Amendment to Louisiana's wrongful death statutory provisions, this Honorable Court held that:

"Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother. These children, though illegitimate, were dependent on her; she cared for them and nurtured them; they were indeed hers in the biological and in the spiritual sense; in her death they suffered wrong in the sense that any dependent would.

"We conclude that it is invidious to discriminate against them when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother."

The recognition of the Constitutional rights afforded to dependent minor children were extended by this Honorable Court in Weber vs. Aetna Casualty and Surety Co., 92 S.Ct. 1400 (1972) in which this Court held that the Louisiana workmen's compensation statutes denying equal recovery rights to dependent unacknowledged illegitimate children violated the equal protection clause. In Weber, the decedent died as a result of injuries received during his employment and at the time of his death he left four legitimate minor children, as well as one unacknowledged minor child and one posthumously born illegitimate minor child. At that time, the Louisiana workmen's compensation law entitled only the legitimate minor children to benefits. However, this Court held that such a statutory scheme violated the equal protection clause and that states could not discriminate against unacknowledged illegitimate dependents or posthumously born illegitimates. Mr. Justice Powell, writing for the majority, stated "We think a posthumously born illegitimate child should be treated the same as a posthumously born legitimate child which the Louisiana statutes fail to do". In response to an attempt by the lower court in Weber to distinguish that case from the Levy decision because the latter involved tort liability and Weber concerned workmen's compensation, Mr. Justice Powell responded,

> "We do not think Levy can be disposed of by such finely carved distinctions. The Court in Levy was not so much concerned with the tortfeasor going free as with the equality of treatment under the statutory recovery scheme. Here, as in Levy, there is impermissible discrimination. An unacknowledged illegitimate child may suffer as much from the loss of a parent as a child born within wedlock or an illegitimate later acknowledged. So far as this record shows, the dependency and natural affinity of the unacknowledged illegitimate children for their father were as great as those of the four legitimate children whom Louisiana law has allowed to recover. The legitimate children and the illegitimate children all lived in the home of the deceased and were equally dependent upon him for maintenance and support. It is inappropriate, therefore, for the court below to talk of relegating

the unacknowledged illegitimates 'to a less favorable position as are other dependent relatives such as parents.' The unacknowledged illegitimates are not a parent or some 'other dependent relative'; in this case they are dependent children, and as such are entitled to rights granted other dependent children."

The main issue in the instant proceedings concerns the claim of the minor children, William and Dawn Roche, to recover for the damages which they sustained as the result of the wrongful death of Joseph D. Roche.

LSA Civil Code Article 2315 is the only statute in Louisiana law under which these minor children would be entitled to proceed against the alleged tortfeasors for the wrongful death of Mr. Roche. This statutory provision provides that if the injured person dies, the right to recover damages caused by an offense or quasi offense shall survive in favor of certain listed persons, including "the surviving spouse and child or children of the deceased". The word "child" used within that Article includes an adopted child.[4]

Appellant, Alice C. Roche, seeks judicial recognition by this Honorable Court of the right of her two minor children to recover for the loss of support, love and affection which the children have suffered as a result of Mr. Roche's wrongful death due to the negligence of others.

Beginning on April 21, 1972, which was the day that William and Dawn Robinson Roche were placed in the Roche home by the Louisiana Health and Human Resources Administration until the time of Mr. Roche's death, the two children were

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[4] "As used in this Article, the words "child", "brother", "sister", "father" and "mother" include a child, brother, sister, father and mother by adoption, respectively.

dependent upon Joseph D. Roche for their subsistence which included income, support, love, affection and guidance. This dependency of these two children upon Mr. Roche arose from his prior contractual committments with the State of Louisiana as well as from his daily performance as the surrogate father of the two children for approximately three years.

Joseph D. Roche and his wife, Alice C. Roche, committed themselves twice through contract with the Louisiana Department of Public Welfare to provide for the care and financial support of the two minor children who had been abandoned by their natural mother.

The first of these contracts was signed on April 21, 1972. This agreement was a standard form used in all adoption cases handled by the Louisiana Department of Public Welfare. Mr. and Mrs. Roche both signed the contract as foster parents and essentially agreed to clothe, educate and care for the children.[5] The twin children remained at the Roche home and were dependent upon Mr. and Mrs. Roche for their physical and emotional existence.

Again on October 1, 1975, Mr. and Mrs. Roche renewed their contractual agreement with the Louisiana Department of Public Welfare concerning the raising of the two minor children. However, the second contract extended the previous agreement and provided that Mr. and Mrs. Roche would institute adoption proceedings and from the date of the contract, would care for the

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[5] In the standard contract agreement entered into between Mr. and Mrs. Joseph D. Roche and the Louisiana Department of Public Welfare the following language is included therein:

"In doing so we, the foster parents, agree:

to provide this child with what is necessary for a normal happy family life, including shelter, food, clothing, care, affection, training, recreation, education and religious teaching."

children as if they were their own children.[6] Mr. and Mrs. Roche signed the latter contract as adoptive parents.

This contractual committment by Mr. Roche relieved the Louisiana Department of Public Welfare, and the State, of its obligation to support these two children. This legal obligation to support the two children had been incurred by the State of Louisiana on May 31, 1974, when the children were declared legally abandoned by a Louisiana State District Court in Calcasieu Parish, Louisiana. When Mr. Roche was killed on December 3, 1975, the children lost their present and future source of support. As a result of the discriminatory application by Louisiana Courts of LSA Civil Code Article 2315, these two children are now deprived of a legal remedy to recover against the tortfeasors who were responsible for their real and actual loss of their social and economic subsistence which Mr. Roche provided them during his lifetime. In Levy, supra, this Court posed the question "why should the illegitimate child be denied rights merely because of his birth out of wedlock?" Appellant, Alice C. Roche, poses a similar question in that why should a child who is dependent upon a man and who is in the

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[6] In the standard contract agreement entered into between Mr. and Mrs. Joseph D. Roche and the Louisiana Department of Public Welfare, the following language is included therein:

> "In doing so we agree:
>
> to care for this child in all respects as if he were our own child, assuming full responsibility for his needs;
>
> if we decide to adopt this child, to wait to file adoption papers until we have the Department's agreement on this action; but, on this agreement being reached, to file a final petition not less than six months and not more than eighteen months after placement;
>
> if, at any time, we decide not to continue with our plan of adopting this child, to return him to the care of the Department of Public Welfare rather than make independent plans for him;"

legal process of being adopted by that man be denied the rights to recover for the man's wrongful death merely because the man dies before the final adoption decree is rendered as a result of State Statutory delays.

The exact language of the wrongful death provisions of LSA Civil Code Article 2315 provides three possible classes of beneficiaries, namely, surviving spouse and child or children, father and mother, or brothers and sisters.

Appellant, Alice C. Roche, submits that the State of Louisiana has been discriminatory in its application and interpretation of the wrongful death provisions of LSA Civil Code Article 2315. This discrimination violates the Equal Protection Clause of the Fourteenth Amendment as to a class of citizens.

In King vs. Cancienne, 316 So.2d 366 (1975), the Louisiana Supreme Court held that a putative spouse[7] had a right to recover for the wrongful death of her putative husband even though she did not technically fit within any of the categories of LSA Civil Code Article 2315. The marriage had been declared a legal nullity and there was no legal or biological relationship between the deceased and the petitioner but the Court arbitrarily decided that the petitioner should be given a right of action under LSA Civil Code Article 2315 even though she did not fit into any of the three categories listed in that statute.

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[7] LSA-Civil Code Article 117:

"The marriage, which has been declared null, produces nevertheless its civil effects as it relates to the parties and their children, if it has been contracted in good faith."

LSA-Civil Code Article 118:

"If only one of the parties acted in good faith, the marriage produces its civil effects only in his or her favor, and in favor of the children born of the marriage".

The wrongful death provisions of LSA Civil Code Article 2315 have also been arbitrarily expanded to include posthumously born children. In Hamilton v. Canal Barge Company, Inc., 395 F. Supp. 978 (1975), the right of a posthumously born child to recover under LSA Civil Code Article 2315 was at issue before the Court. In that case, an employee of Petrolane Offshore Construction Service, Inc. was killed in the course of his employment when a part of a mooring bit on a barge broke off. The employee was only engaged to be married at the time of the death. After his death, his fiancee learned from her doctor that she was two months' pregnant. The wrongful death action brought on behalf of the unacknowledged illegitimate minor child was upheld by the Court. The Court held that "a posthumous child may recover for the wrongful death of his parent; the important issue is whether the decedent was the parent, not the date when the child was born."

The Louisiana Supreme Court expanded the application of LSA Civil Code Article 2315 in Warren v. Richard, 296 So.2d 813 (1974). In that case, the Court held that "an illegitimate child could recover for the wrongful death of her biological father though, at the same time, she was also the legitimate child of another man under the provisions of LSA Civil Code Article 184.[8] This decision gave one child two wrongful death actions and that Honorable Court cited language indicating that the child should not be punished for his birth or legal classification.

In the instant case, Mr. and Mrs. Roche instituted legal adoption proceedings in State District Court a few weeks before Mr. Roche was killed and within one month after his death a Final Adoption Decree was rendered by the Court. William and Dawn became the legal children of Mr. and Mrs. Roche in much the

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[8] "The law considers the husband of the mother as the father of all children conceived during the marriage."

same manner as if they had been in Mrs. Roche's womb at the time of her husband's death. In both instances, a legal relationship was acquired after the decedent's death.

The Louisiana Supreme Court's refusal to recognize dependent minors undergoing virtually certain adoption as beneficiaries within LSA - Civil Code Article 2315 is arbitrary, capricious and unreasonably discriminatory and violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Conclusion

For the foregoing Reasons, Probable Jurisdiction should be noted.

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APPENDIX

APPENDIX A

Opinion and Judgments of the Fifteenth Judicial District Court for the Parish of Acadia, State of Louisiana..... 16

APPENDIX B

Opinion and Judgment of the Court of Appeal, Third Circuit, State of Louisiana..... 20

APPENDIX C

Opinion, Judgment and Denial of Rehearing of the Supreme Court of Louisiana..... 31

ALICE C. ROCHE, ET AL	:	15TH JUDICIAL DISTRICT COURT
VERSUS	:	NUMBER 40,732
BIG MOOSE OIL FIELD TRUCK SERVICE, INC., ET AL	:	ACADIA PARISH, LOUISIANA

REASONS FOR JUDGMENT

On December 3, 1975 Joseph Roche was killed while in the employ of Fred Wilson Drilling Company, Inc. This suit was filed by the widow individually and as a natural tutrix of two (2) minor children who were residing with the plaintiff and the decedent at the time of his death but were not biological children of either, the plaintiff or the decedent.

A petition for adoption of the children had been filed, however, no interlocatory decree was entered and the final decree of adoption was rendered January 5, 1976, after Mr. Roche's death. The court concludes that there is no cause or right of action in the children for Mr. Roche's death. See Bertrand vs. State Farm Fire and Casualty Company, 333 So.2d 322; Simmons vs. Brooks, 342 So.2d 236; and In re Spraggins, 234 So.2d 462.

The defendants have filed a suit stating that Act 147 of 1976 barring executive officers suit should be applied retroactively. The courts have now held that it is not to be applied retroactively and therefore, this exception is denied.

The court also reluctantly concludes that R.S. 23:1102 requires that the plaintiff in this suit should be required to intervene in the suit filed by the employer and his insuror. This court is not pleased with the results brought about by

the provisions of R.S. 23:1102, however, this court feels bound to reach this conclusion.

Costs of court to be borne by the plaintiff.

Appropriate judgment will be signed upon presentation.

Reasons rendered at Lafayette, Louisiana this 31 day of July, 1978.

Douglas J. Welsh
DISTRICT JUDGE

ALICE C. ROCHE, ET AL	:	15TH JUDICIAL DISTRICT COURT
VS. NO. 40,732	:	STATE OF LOUISIANA
BIG MOOSE OIL FIELD TRUCK SERVICE, INC., ET AL	:	PARISH OF ACADIA
	:	
Filed: _____	:	_____ DEPUTY CLERK OF COURT

* * *

J U D G M E N T

This cause was heard on two Exceptions of No Cause or Right of Action filed on behalf of defendants, David Fite, L. J. Guidroz, Clyde Wilbert Johnson, Fred Wilson and Liberty Mutual Insurance Company; the Court considering the pleadings and law applicable, and for written reasons assigned July 31, 1978:

ORDERED that the Exception of No Cause or Right of Action relating to the claims asserted on behalf of William Donald Roche and Dawn Rachelle Roche, is sustained and both claims dismissed with prejudice.

FURTHER ORDERED that the Exception of No Cause or Right of Action relating to the applicability of Act 147 of 1976 is overruled.

JUDGMENT RENDERED on July 31, 1978.

JUDGMENT SIGNED at Lafayatee, Louisiana on the 10 day of August, 1978.

Douglas J. Nehrbass
DOUGLAS J. NEHRBASS
District Judge

FILED 8-30-1978
Barbara Daigle
DEPUTY CLERK OF COURT
CROWLEY, ACADIA PARISH, LA.
A TRUE COPY-ATTEST

ALICE C. ROCHE, ET AL.	:	15TH JUDICIAL DISTRICT COURT
V. NO. 40,732	:	STATE OF LOUISIANA
BIG MOOSE OIL FIELD TRUCK SERVICE, INC., ET AL.	:	PARISH OF ACADIA

FILED: _____ _____
DEPUTY CLERK

J U D G M E N T

This cause was heard on a Preemptory Exception urging the exception of no Right of Action and the Preemptory Exception urging the Exception of No Cause of Action filed on behalf of defendants Big Moose Oil Field Truck Service, Inc., and Reliance Insurance Company;

The Court considering the pleadings and the applicable law, and for written reasons assigned July 31, 1978:

IT IS HEREBY ORDERED, that the Preemptory Exception urging the Objection of No Right of Action on behalf of the minors, William Donald Roche and Dawn Rachelle Roche be, and it is hereby sustained, dismissing those claims with prejudice.

IT IS FURTHER ORDERED that the Preemptory Exception raising the objection of No Cause of Action on the grounds of plaintiff filing a separate suit instead of intervening in the pending suit filed by the workmen's compensation insurer be and it is hereby maintained, and her lawsuit herein be dismissed without prejudice, all at her cost.

JUDGMENT RENDERED on July 31, 1978.

JUDGMENT SIGNED at Lafayette, Louisiana, the 9th day of October, 1978.

Douglas J. Hebert
DISTRICT JUDGE

FILED 10-17 19 78
Brenda Hebert
DEPUTY CLERK OF COURT
CROWLEY, ACADIA PARISH, LA.
A TRUE COPY - ATTEST

NUMBER 6988

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

ALICE C. ROCHE, ET AL. — Plaintiff & Appellant

VERSUS

BIG MOOSE OILFIELD TRUCK SERVICES, INC., ET AL. — Defendant & Appellee

Appeal from the Fifteenth Judicial District Court for the Parish of Acadia, Judge Douglas J. Nehrbass presiding

Before Culpepper, Domengeaux and Guidry, Judges

Culpepper, Judge

This is a wrongful death action. The plaintiff, Mrs. Alice C. Roche, sues individually and as "natural tutrix" of the minors, William Donald Roche and Dawn Rachelle Roche, alleged adopted children of plaintiff and her husband, Joseph Daniel Roche. Mr. Roche was killed on December 3, 1975 while working as a roustabout for Fred Wilson Drilling Company, Inc. He was crushed when a load of heavy steel drill pipes fell from a truck owned by Big Moose Oilfield Truck Services, Inc. Named as defendants are Big Moose Oilfield Truck Services, Inc., Gardner LaCombe, driver of the truck, and their insurer, Reliance Insurance Company, all of whom are hereinafter referred to as the "Big Moose defendants". Also named as defendants are certain executive officers and employees of Fred Wilson Drilling Company and their insurer, Liberty Mutual, hereinafter referred to as the "Fred Wilson defendants".

The Fred Wilson defendants filed two exceptions. The first alleges the minor children have no right or cause of action for the death of Mr. Roche because the final decree of adoption

of the children was not until January 5, 1976, approximately one month after the death of Mr. Roche. The second exception by the Fred Wilson defendants is that plaintiff has no cause of action because Act 147 of 1976, which abolishes the so-called "executive officer" actions, applies retroactively to this 1975 accident.

The Big Moose defendants also filed two exceptions. The first is the same as that filed by the Fred Wilson defendants, i.e., that the minor children were not finally adopted by Mr. Roche before his death. The second exception by the Big Moose defendants alleges that Mrs. Roche has no cause or right of action to file the present suit, since her sole remedy is to intervene in the prior suit filed by Fred Wilson's workmen's compensation insurer against Big Moose to recover workmen's compensation benefits paid. In support of this second exception, the Big Moose defendants cite LSA-R.S. 23:1102 as authority for the contention that once an action is filed by the employer or the employer's insurer under LSA-R.S. 23:1101, then the employee or his heirs must intervene in that suit or else be barred from recovery.

All of these exceptions by both sets of defendants were heard on the same date, May 1, 1978, and were taken under advisement. On July 31, 1978, the district judge rendered written reasons holding: (1) The children have no right of action since the adoption was not final; (2) Act 147 of 1976 barring executive officer suits is not retroactive; (3) Mrs. Roche has no cause of action in the present suit since under R.S. 23:1102 she must intervene in the prior suit filed by the workmen's compensation insurer against the tort feasors.

Pursuant to the written reasons rendered on July 31, 1978, a judgment was rendered and signed on August 10, 1978 in favor of only the Fred Wilson defendants sustaining their exception of no right of action as to the minor children but overruling their exception as to the retroactive effect of Act 147 of

1976. On October 9, 1978, a separate judgment was rendered sustaining both exceptions urged by the Big Moose defendants.

On November 3, 1978, plaintiffs obtained an order for an appeal from the judgment "rendered herein on July 31, 1978 and read and signed in Chambers on October 9, 1978." The motion and order for appeal does not expressly mention the judgment rendered on August 10, 1978, but the motion does pray that ultimately judgment be rendered in plaintiff's favor against all defendants.

The issues on appeal are: (1) Are both the judgment of August 10, 1978 in favor of the Fred Wilson defendants and the judgment of October 9, 1979 in favor of the Big Moose defendants before us on appeal? (2) Do the minor children have a right of action for the wrongful death of Mr. Roche where the final decree of adoption had not been signed before his death? (3) Under LSA-R.S. 23:1102, is Mrs. Roche required to intervene in the prior suit by the workmen's compensation insurer against the tort feasors rather than proceed in her present separate suit?

VALIDITY OF APPEAL AS TO FRED WILSON DEFENDANTS

The Fred Wilson defendants have not filed a motion to dismiss the appeal as to them, but they did file a brief contending that plaintiff did not appeal from the judgment of August 10, 1978 dismissing the claims of the two children against them, and that since the delays for appeal from that judgment have now elapsed the judgment is final.

At the outset, we notice that the motion and order filed by the plaintiff on November 3, 1978 is only for a suspensive appeal, and a bond was fixed in the sum of $100, but no such bond was ever furnished. Jurisprudence has established the rule that although the motion and order is for a suspensive appeal only, if the bond fixed is not filed within the delay for a suspensive

appeal but is filed within the delay for a devolutive appeal, the appeal will be sustained and treated as a devolutive appeal. Succession of Garrett, 288 So.2d 657 (3rd Cir. 1974). Under LSA-C.C.P. Article 2087, the delay for taking a devolutive appeal in the present case is within sixty days of the expiration of the delay for applying for a new trial, and thus is timely. Furthermore, under LSA-C.C.P. Article 2124, as amended by Act 176 of 1977, no security is required for a devolutive appeal, and thus none was required for a devolutive appeal in this case.

The question is whether the motion and order for appeal filed on November 3, 1978 constitutes an appeal from both the judgment of August 10, and the judgment of October 9, 1978. If it does not, the judgment of August 10, 1978 is now res judicata and is not before us.

The problem is difficult. There are early cases which support the argument of the Fred Wilson defendants that since the November 3 motion and order for appeal does not expressly state that it is an appeal from the August 10, 1978 judgment, no appeal has been taken from that judgment. For instance, in In Re Guardian Homestead Association, 199 La. 216, 5 So.2d 751 (1942), which was a liquidation proceeding against an association, one judgment was rendered for the liquidator's special agent for his services, and another judgment was rendered for the liquidator's attorneys for their services, but there was only one motion and order for appeal which stated it was from the judgment in favor of the agent and the attorneys, without otherwise identifying the judgment appealed by date. Our Supreme Court dismissed the appeal on the basis that the motion and order did not sufficiently identify the judgment appealed. The court cited In Re Liberty Homestead Association, 198 La. 1068, 5 So.2d 353 (1941) and Pichon v. Pichon Land Company, 174 La. 77, 139 So. 764,

which also support the view that the motion and order for appeal must clearly identify the judgment appealed, as, for example, by date and by names of the appellees.

On the other hand, there are several cases which support the appellant. In Kirkeby-Natus Corporation v. Campbell, 250 La. 868, 199 So.2d 904 (1967) a money judgment in favor of the plaintiff was read and signed on March 25, 1965. Defendant moved for a new trial, which was denied on July 6, 1965. In his motion and order for appeal, the defendant described the judgment by amount and by parties, but he erronesouly gave the date as July 6, 1965. After first stating the general rule that appeals are favored and should not be dismissed except for "substantial causes", the court held that since the judgment overruling the motion for a new trial was not appealable, the only appealable judgment was that rendered on March 25, 1965, and that it was obviously the intention of the defendant to appeal from the judgment on the merits. The opinion states: "It is apparent that the allegation in the petition relating to the judgment rendered on July 6, 1965 was an inadvertent error which was neither misleading nor prejudicial to anyone involved in the litigation." The motion to dismiss the appeal was denied. This decision was followed in several later cases, including Fruehauf Trailer Company v. Baillio, 252 La. 181, 210 So.2d 312 (1968) and Smith v. Hartford Accident & Indennity Company, 254 La. 341, 223 So.2d 826 (1969).

The most recent case on the issue is Mirambell v. Lucien J. Caruso, Inc., 365 So.2d 1196 (4th Cir. 1979), where one of two defendants filed an exception of prescription, and the trial court, by mistake, maintained the exception as to both defendants in a judgment signed on February 15, 1978. On February 23, the second defendant filed an exception of prescription.

Also on February 23, plaintiffs moved for a new trial, complaining, inter alia, about the dismissal of the second defendant in the February 15 judgment. Both the motion for new trial and the second defendant's exception of prescription were heard on March 10. The motion for a new trial was denied and the second defendant's exception of prescription was sustained on March 10, and a judgment to this effect was rendered on March 28. On May 5, plaintiff moved for an appeal from the judgment of February 15 "and from the motion for a new trial denied on the 10th day of March, 1978." In the Court of Appeal, the second defendant moved to dismiss the appeal as to him on the grounds that no appeal had been taken from the March 28 judgment against him. The Fourth Circuit Court of Appeal denied the motion, stating: "The evident intent of this appeal was to obtain reversal of the dismissal of the second defendant (as well as of the dismissal of the first). Plaintiffs' motion for appeal included the March 10 ruling that later entered into the March 28 judgment, and gave the second defendant ample notice that plaintiffs were continuing the pursuit of the second defendant. The case is thus comparable to those in which an appeal purporting to be from the judgment denying a new trial was held to constitute an appeal from the principal judgment."

We express no opinion as to the correctness of Mirambell. It went farther than any case from our Supreme Court in holding that where the appellant intended to appeal a separate judgment which, through inadvertent error, was not described in the motion or order of appeal, the appeal from the separate judgment will nevertheless be entertained where no one was misled nor prejudiced. If we were to entertain the appeal at issue here, we would have to go even farther than Mirambell. In the present case, as in Mirambell, Mrs. Roche intended to appeal both the judgment of August 10 sustaining the exception filed by the Fred Wilson defendants, as well as the judgment of October 9, 1978 sustaining the exceptions filed by the

Big Moose defendants. However, the present case differs from Mirambell in that here the exceptions filed by the Fred Wilson defendants were different from those filed by the Big Moose defendants, whereas in Mirambell the exceptions filed by the two defendants were the same, i.e., prescription. Furthermore, if we entertain an appeal from the judgment in favor of the Fred Wilson defendants, these defendants will be prejudiced, because if the judgment sustaining their exception as to the right of action of the minor children was not properly appealed, the issue of their liability to the minor children is now res judicata.

Although we recognize the rule that appeals are favored, there is also the rule expressed in the above cited Supreme Court cases that there must be certainty and definiteness as to what judgment is being appealed, because many important rights are affected. We think it would be a dangerous precedent to hold in the present case that there was an appeal from the judgment in favor of the Fred Wilson defendants.

RIGHT OF ACTION OF THE MINOR CHILDREN

The next issue is whether the minor children have a right of action for the wrongful death of Mr. Roche under LSA-C.C.P. Article 2315, which provides that if the injured person dies the right to recover damages caused by an offense or quasi offense shall survive in favor of certain listed persons, including "the surviving spouse and child or children of the deceased." The article also provides: "As used in this article, the word 'child', . . . includes a child, . . . by adoption."

The facts are that Mr. and Mrs. Roche were married in 1968 and had no natural children. In 1974, the Juvenile Court for the Parish of Calcasieu decreed the children to be abandoned and awarded their custody to the Louisiana Health & Social and Rehabilitation Services Administration for placement by the agency in the best interest of the children. The children were placed by the agency in the home of Mr. and Mrs. Roche. On November 19, 1975, Mr. and Mrs. Roche applied to the Juvenile Court for the Parish of Acadia for adoption of the children in compliance with LSA-R.S. 9:421, et seq. The hearing on the final decree of adoption was set for January 5, 1976. Mr. Roche was killed on December 3, 1975.

In Bertrand v. State Farm Fire & Casualty Company, 333 So.2d 322 (3rd Cir. 1976), a two-year old child drowned in an oxidation pond. The natural mother had surrendeded the child to the child's maternal grandparents for adoption, and the grandparents had obtained an interlocutory decree of adoption, but the final decree had not been granted. We held under LSA-C.C. Article 2315 that since the final decree of adoption had not been granted the grandparents had no right of action, and that the natural mother had not lost her right of action. We cited cases holding the general rule that adoption is a creature of statutory law in derogation of the rights of natural children and parents, and therefore must be strictly construed. Rodden v. Davis, 293 So.2d 57β (3rd Cir. 1974) and the cases cited therein.

The rationale of Bertrand is controlling in the present case. We affirm the holding by the trial judge that the minor children have no right of action under Article 2315.

Mrs. Roche argues that because the children were adopted by her shortly after Mr. Roche's death, they should be treated in the same manner as posthumous children. Plaintiff also arques that since Mr. Roche intended to adopt the children, Article 2315 should be extended to include them. For the reasons set out above and more fully explained in the opinion in Bertrand, we reject these arguments.

MANDATORY DUTY OF MRS. ROCHE TO INTERVENE IN PRIOR SUIT BY WORKMEN'S COMPENSATION INSURER

The final issue on appeal is whether Mrs. Roche is required to intervene in the workmen's compensation insurer's prior suit under LSA-R.S. 23:1102 which provides:

> "If either the employee or his dependent, or the employer, brings suit against a third person as provided in R.S. 23:1101, he shall forthwith notify the other in writing of such fact and of the name of the court in which the suit is filed, and such other may intervene as party plaintiff in the suit." (Emphasis supplied)

The facts are that on December 2, 1976 the workmen's compensation insurer for Mr. Roche's employer filed suit against the Big Moose defendants under LSA-R.S. 23:1101 to recover workmen's compensation benefits paid. The present suit was filed by Mrs. Roche on December 3, 1976.

Athough LSA-R.S. 23:1102 provides that if either the employee or the employer bring suit against a third person, the other "may" intervene, jurisprudence has established the rule that the employer's failure to intervene after proper notice bars him from bringing a separate suit against the third party. Todd-Johnson Drydocks v. City of New Orleans, 55 So.2d 650 (Orl. App. 1951); Marquette Casualty Company v. Brown, 235 La. 245, 103 So.2d 269 (1957); National Surety Corporation v. Standard Accident Insurance Company, 281 So.2d 848 (1st Cir. 1973), writ denied 348 So.2d 336.

Whether the same rule applies to the employee has not been clearly established in our jurisprudence. There is dicta in several cases suggesting that the rule applies to the employee as well as the employer. For example, in National Surety Corporation v. Standard Accident Insurance Company, supra, our Supreme Court held that a suit by the employer's compensation insurer against the third party tort feasor interrupted prescription as to a suit filed by the employee more than one year after the accident for the reason that there is only one cause of action under R.S. 23:1101. In dicta, the court stated:

> "LSA-R.S. 23:1101, 23:1102, 23:1103, supra, do not set forth whether the injured employee or employer or the employer's insurer shall sue first; when one files suit, however, the other, if he desires recovery must intervene. The intervention is incidental despite that it is filed by the employee. Article 1031, LSA-Code of Civil Procedure, supra."

Also, in Marquette Casualty Company v. Brown, supra, where the question was whether a suit by the employer interrupted prescription as to a later suit by the employee, the court stated:

> "In addition, whenever a suit is brought against the tortfeasor by either the employer or the injured employee, the statute requires that the plaintiff give notice to the other interested party. Accordingly, should the injured employee institute suit, the compensation paying employer, upon notification thereof, no longer has the right to bring an independent action; he must intervene in the employee's suit or his right to reimbursement for compensation will be lost."

This language in Marquette Casualty Company implies that regardless of whether the employer or the employee files suit first, the other must intervene or his right of action will be lost. One policy reason suggested as supporting this rule is that the third party tort feasor has a right to have his liability fixed in one proceeding.

In his written reasons, the trial judge states he "reluctantly" concludes the present jurisprudence requires the plaintiff to intervene in the prior suit filed by the employer's insurer. The trial judge was probably of the view that LSA-R.S. 23:1102 was intended by the legislature to protect the employer from losing his indemnification in the event of a suit by the employee against the third party tort feasor. Since the employee does not need similar protection of his rights against the tort feasor, the legislature may not have intended that the employee's right to sue the tort feasor be restricted to intervention in the event of a prior suit by the employer. Nevertheless, the present jurisprudence of our Supreme Court supports the trial judge's holding.

A final matter which should be mentioned is that the Fred Wilson defendants requested in their brief that in the event we find the August 10, 1978 judgment in their favor is before us on appeal, they be given the opportunity to file a brief on the

merits, which they have not yet done. Since we hold the August 10, 1978 judgment was not appealed, there is no need for briefs by the Fred Wilson defendants on the merits of the right of action of the minor children.

For the reasons assigned, the judgment appealed is affirmed. All costs of this appeal are assessed against the plaintiff-appellant.

AFFIRMED.

FEB 15 1980

SUPREME COURT OF LOUISIANA

ALICE C. ROCHE, ET AL

VERSUS

NO. 65,285

BIG MOOSE OIL FIELD TRUCK SERVICE, ET AL

On Writ of Certiorari or Review to the Court of Appeal
Third Circuit
Parish of Acadia

CALOGERO, Justice

This is a wrongful death action by a surviving wife, individually and as tutrix of her adopted children, for the death of her husband and the children's prospective adoptive father who was killed while unloading a truck owned by Big Moose Oilfield Truck Services. Named as one group of defendants are the driver of the truck, Big Moose, and their insurer (the Big Moose defendants). A second group of defendants includes certain executive officers and employees of Fred Wilson Drilling Company and their insurer (the Fred Wilson defendants). We granted writs (375 So.2d 658 (La. 1979)) to resolve the following issues:

1) Whether the minor children have a right of action for the wrongful death of decedent when the final decree of adoption was not rendered before his death.

2) Whether plaintiff under R.S. 23:1102 is required to intervene in the prior suit filed by

Dennis, J. concurs and assigns reasons.
Lemmon, J. concurs in part and dissents in part and assigns reasons.

the workman's compensation insurer against the tortfeasor rather than proceed in her own separate suit?

Plaintiff Alice C. Roche and the decedent Joseph Daniel Roche were married in 1968. They had no children. In 1974 the Juvenile Court for the Parish of Calcasieu decreed William David Robinson and Dawn Rochelle Robinson to be abandoned and awarded their custody to the Louisiana Health and Human Resources Administration for placement, in the best interest of the children. The children had been living with the Roches since April 21, 1972 as their foster children.

On December 2, 1976 Liberty Mutual Insurance Company, the workman's compensation insurance carrier for decedent's employer at the time of the death, filed suit in the Fifteenth Judicial District Court against the Big Moose defendants to recover compensation benefits paid. The next day the plaintiff individually and on behalf of the two minor children filed this wrongful death action, also in the Fifteenth Judicial District. Both sets of defendants filed exceptions. The trial court ruled that the minor children have no right of action because they were not adopted before Joseph Roche's death (on exceptions filed by both sets of defendants), that Act 147 of 1976 which abolished "executive officer" actions does not apply retroactively to this action (on exception of the Fred Wilson defendants alone), and that Mrs. Roche has no right or cause of action to file the present suit because her sole remedy is to intervene in the suit previously filed by the compensation insurer (on exceptions filed by both sets of defendants).

On appeal the Third Circuit affirmed the trial court's ruling that the minor children have no right of action because they were not adopted at the time of decedent's death, and affirmed the dismissal of Mrs. Roch's action on the ground that R.S. 23:1102

requires that she intervene in the compensation insurer's previously filed suit.

That court also concluded that plaintiffs had not appealed from the August 10, 1978 ruling on the exception of the Fred Wilson defendants as to the children's right of action.[1]

Footnote 1

The issue of whether the plaintiffs had appealed the ruling on the Fred Wilson defendants' exception arose in the following context: All of the exceptions of both sets of defendants were heard on May 1, 1978. On July 31, 1978, the district court judge rendered written reasons for judgment. Pursuant to the written reasons rendered July 31, 1978, the court rendered and signed a judgment on August 10, 1978 in favor of only the Fred Wilson defendants, sustaining their exception of no right of action as to the minor children but overruling their exception as to the retroactive effect of Act 147 of 1976. On October 9, 1978, a separate judgment was rendered sustaining both exceptions urged by the Big Moose defendants.

On November 3, 1978 plaintiffs obtained an order for an appeal from the judgment "rendered herein on July 31, 1978 and read and signed in Chambers on October 9, 1978." Plaintiffs' motion and order for appeal did not specifically mention the judgment rendered on August 10, 1978 on the Fred Wilson defendants' exceptions.

In the Court of Appeal the Fred Wilson defendants argued that the plaintiffs simply did not appeal from the trial court's judgment of August 10, 1978 which had dismissed the claims of the two children against them. They argued that because plaintiffs obtained an order for appeal from the judgment rendered October 9, 1978 and because the order did not mention the August 10, 1978 judgment rendered on their exception, that judgment (August 10, 1978) was final. The Court of Appeal determined that although it may have been the intention of plaintiffs to appeal both judgments (August 10, 1978 and October 9, 1978), they simply had not done so since the order of appeal only specified the October 9, 1978 judgment.

The Court of Appeal in expressing that there was no need for briefs by the Fred Wilson defendants on the merits of the right of action of the minor children, related that they were holding the August 10, 1978 judgment was not appealed. That resolution, or "holding," was not necessary to the decision since the trial court judgment maintaining the exceptions of no right of action of the minor children was affirmed. So, too, for the purpose of our review, it is unnecessary to resolve the procedural question of whether plaintiffs timely appealed the August 10, 1978 judgment maintaining the exception of no right of action urged by the Fred Wilson defendants.

To determine whether these minor children have a right of action for the wrongful death of Joseph Roche, we must examine Article 2315 of the Louisiana Civil Code which creates the survival and wrongful death actions and the classes of beneficiaries who in the order of preference may recover damages thereunder. The first class of beneficiaries includes "the surviving spouse and child or children of the deceased."

Adopted children were first included as beneficiaries by Acts 1948, No. 333, §1 which amended Article 2315 to extend the right of action to children who were adopted. The article was again amended in 1960 to its present form to provide that the word child as used in that article includes a child "by adoption."[2] Whether we can find that the word child also includes a child for whom a petition of adoption has been filed but whose adoption is not final is the issue here.

In Bertrand v. State Farm Fire and Casualty Co., 333 So.2d 322 (La. App. 3rd Cir. 1976), an analogous situation was presented. There a mother had surrendered her minor child to the child's maternal grandparents for adoption. After an interlocutory decree but before a final decree of adoption, the child drowned. Both the child's mother and his maternal grandparents sued for damages for wrongful death. The Court of Appeal held that because the grandparents were not the mother and father of the child "by adoption" within the meaning of Civil Code Article 2315 (because the final decree of adoption had not been rendered), the child's mother rather than the prospective adoptive parents had the right of action under Article 2315.

Footnote 2

Article 2315 as amended in 1960 provides in pertinent part:

> "As used in this article, the words 'child', 'brother', 'sister', 'father', and 'mother' include a child, brother, sister, father, and mother, by adoption, respectively."

It is well-settled in the jurisprudence that the right of action created by Article 2315 may be extended only to the beneficiaries named in the statute and that the classes of beneficiaries must be strictly construed. As stated in Thompson v. Vestal Lumber Manufacturing Co., 16 So.2d 594 (La. App. 4th Cir. 1943), "Upon whom [the right of action] should devolve was a matter that peculiarly addressed itself to the Legislature. It has acted and the beneficiaries named may not be increased by judicial action."

In the instant case the minor children are not the "children"of the decedent "by adoption" within the meaning of Article 2315. Although they may have been dependent upon decedent for support and affection, they are neither his biological nor his adoptive "children." We therefore can not find that they have a right of action under Article 2315 for his death.

In brief plaintiffs present the following additional arguments:

1. That the minor children even if not the adopted children of decedent suffered no less than if their prospective adoptive father had died after the final decree of adoption than before because they were totally dependent upon him for income, support, guidance and affection;

2. That Mr. and Mrs. Roche had committed themselves twice through contract with the Department of Public Welfare to provide for the care and financial support of the children;

3. That the doctrine of equitable adoption which is recognized in some common law jurisdictions should be applied in this case. See In Re Williams, 348 P.2d 683 (Utah,1961); Bower v. Landa, 371 P.2d 657 (Nev. 1962);

4. That the prospective adoptive children should be treated under the law at least as well as illegitimate children who in Levy v. Louisiana, 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.

2d 436 (1968), on remand 253 La. 73, 216 So.2d 818 (1968) were afforded the right to recover for the wrongful death of their mother upon whom they were dependent;

5. That the children should be treated as "posthumous children" who being born after the death of their father are accorded all the legal rights of legitimate children. See La. Code Civ. art. 29 which provides that "children in their mother's womb are considered in whatever relates to themselves as if they were already born. . . ."

We have considered each of plaintiffs' arguments and try as we might to find a legal basis for holding that the minor children have a right of action, we can reach no other conclusion than that the arguments have no merit. None of these equitable considerations, separately or together, serve to make these children the adoptive children of decedent within the meaning of Article 2315. Furthermore the common law cases relying on the doctrine of equitable adoption (which cases represent only two of the common law jurisdictions) are of no assistance in the interpretation of Article 2315. The argument based on Levy v. Louisiana, supra, is also unpersuasive because the holding in that case was based on a finding that the restrictive interpretation of Article 2315 which excluded illegitimate biological children from the class of beneficiaries was invidiously discriminatory on the basis of birth. The children in the instant case are not decedent's biological children; therefore Levy is inapposite.

Plaintiffs' argument that the children should be treated just as would a decedent's posthumous children is possibly their best argument. While we recognize that there is some analogy between a fetus in its mother's womb which is born after the death of its father and a prospective adoptive child whose adoption had been petitioned for but which is scheduled to become final only a month after the prospective father's death, the rule that Article 2315 be strictly interpreted requires

that we not expand the classes of beneficiaries by analogy. Moreover, the analogy between the two is a weak one. In the case of a fetus which subsequent to the father's death is born alive, the father can do nothing to prevent the child's brith or status, unlike the present case in which the decedent Joseph Roche could have withdrawn his consent prior to the final adoption decree. Additionally the posthumous child's being born alive is unaffected by and unrelated to the event which gives rise to its Article 2315 rights--the death of its father. The prospective adoptive child's claim, on the other hand, is directly related to and dependent upon the father's continued concurrence in the adoption, a matter affected by and in fact prevented by his pre-adoption death.

We must next consider the primary issue which prompted our grant of this writ: Whether Mrs. Roche, who does indeed have a right of action for the wrongful death of her husband, must intervene in the suit filed by the decedent's workman's compensation insurer.

The right of an employer or his compensation insurer to seek redress from a third person causing injury to an employee, for which the employee is entitled to compensation,

is established by R.S. 23:1101, et seq. The first paragraph of R.S. 23:1101 recognizes that the exclusive remedy of the employee against his employer for employment related injuries does not affect that employee's right to seek damages from some person other than the employer for his injuries. That statute further provides that the employer may recover any amount which he has paid or has become obligated to pay as compensation to the employee or his dependents.[3]

Under R.S. 23:1102 if either the employer or the employee brings suit against a third person as provided by R.S. 23:1101, the other may intervene:

> "If either the employee or his dependent, or the employer, brings suit against a third person as provided in R.S. 23:1101, he shall forthwith notify the other in writing of such fact and of the name of the court in which the suit is filed, and such other may intervene as party plaintiff in the suit." (emphasis provided)

Footnote 3

Louisiana Revised Statute 23:1101 provides:

> "When an injury or compensable sickness or disease for which compensation is payable under this Chapter has occurred under circumstances creating in some person (in this Section referred to as third person) other than those persons against whom the said employee's rights and remedies are limited in Section 1032 of this Chapter, a legal liability to pay damages in respect thereto, the aforesaid employee or his dependents may claim compensation under this Chapter and the payment or award of compensation hereunder shall not affect the claim or right of action of the said employee or his dependents, relations, or personal representatives against such third person, nor be regarded as establishing a measure of damages for the claim; and such employee or his dependents, relations, or personal representatives may obtain damages from or proceed at law against such third person to recover damages for the injury, or compensable sickness or disease.
>
> Any person having paid or having become obligated to pay compensation under the provisions of this Chapter may bring suit against such third person to recover any amount which he has paid or become obligated to pay as compensation to such employee or his dependents."

Although that statute provides that the other party may intervene as a party plaintiff if either the employee or the employer brings suit against the third person, the jurisprudence holds that an employer's failure to intervene in a suit filed by the employee, after proper notice, bars the employer from bringing a separate suit against the third party tortfeasor. Todd-Johnson Dry Docks v. City of New Orleans, 55 So.2d 650 (Orl. App., 1951); Marquette Casualty Company v. Brown, 235 La. 245, 103 So.2d 269 (1957); National Surety Corporation v. Standard Accident Insurance Company, 247 La. 905, 175 So.2d 263 (1965). No case however has held that an employee's timely filed suit must be dismissed if the employer has pending a previously filed suit for reimbursement of compensation paid.

In Todd-Johnson Dry Docks, Inc. v. City of New Orleans, supra, the court held that an employer's failure to intervene in an employee's previously filed action bars the employer's claim for reimbursement of the benefits paid. That court reasoned that R.S. 23:1102 does not create a "new, independent action based on the compensation paid. [Citations omitted] All that statute does is recognize the fact that as a result of Article 2315 of our Civil Code, an injured employee may collect damages from the third party tort-feasor, and that if he is entitled to such damages the employer may, by pursuing the proper course of action, obtain out of those damages the amount for which he is liable in compensation." That court recognized that it is the employee's cause of action under Article 2315 and that the employer's action is only incidental thereto and only for the amount he has paid in compensation.

Respondent in brief relies upon language in National Surety Corporation v. Standard Accident Insurance Company, supra, to argue that the issue of whether an employee must intervene is settled. In that case the issue presented was

whether a suit by a compensation insurer against the third party tortfeasor interrupted prescription as to a suit filed by the employee more than one year after the accident. There we held that because there is only one cause of action from which both the employee and employer's claim arise, there could be only one prescriptive period and that it was interrupted by the timely filing of suit by the employer. The Court, however, in passing, stated:

> "LSA-R.S. 23:1101, 23:1102, 23:1103, supra, do not set forth whether the injured employee or employer or the employer's insurer shall sue first; when one files suit, however, the other, if he desires recovery must intervene. The intervention is incidental despite that it is filed by the employee. Article 1031, LSA-Code of Civil Procedure, supra." (Emphasis provided)

Although we there stated that the employee's action is "incidental" and that when either the employee or the employer has filed suit first, the other, if he desires recovery, must intervene, that language was unnecessary to our holding and therefore dicta. While the observation that the employee's action was incidental may be relevant to whether prescription was interrupted, it does not bear on the issue of whether a timely filed action by an employee may be dismissed because of a previously filed action of the employer.

One apparent purpose for preferring to require intervention of an employer or an employee into a lawsuit previously filed by the other is to prevent the third party tortfeasor from having to defend two separate lawsuits based on the same delictual and quantum facts. As suggested by the Court of Appeal another reason for allowing intervention is to protect the employer from losing his right to indemnification in the event of a lawsuit by the employee against the tortfeasor. While each of these is a valid purpose, neither is sufficient to require an employee, to whom the cause of action accrues under Article 2315 and who under R.S. 23:1101 has a tort claim, to intervene in an earlier filed action by the employer. It is the employee or his statutory beneficiaries

who have suffered the full loss compensable under Article 2315, not the employer. The employer's right is only a statutory one under R.S. 23:1101 for reimbursement of compensation paid or payable out of the employee's damage claim.

In a case such as this in which the employer filed suit first (December 2, 1976) and the employee chose to file a separate lawsuit (only one day later), if one of the lawsuits has to be dismissed, it makes more sense that it be that of the employer. While many employees may choose simply to intervene where a lawsuit has already been filed by the employer, the employee who timely files a separate action should not be required to do so, and indeed is not required to do so under R.S. 23:1102 which provides simply that either party may intervene. If an employee files suit for damages from the third party tortfeasor, an employer seeking reimbursement of compensation paid must intervene in the pending lawsuit, as per Todd-Johnson, supra, and as per the dicta in National Surety, supra. That jurisprudence as it relates to the employer's second filed suit is unaffected by our decision here. We hold in this case that if an employer files suit first, the employee may still maintain a separate action for his damages and need not intervene in the employer's pending lawsuit. All that we must do, and are doing here, to resolve the legal issue before us is to find that the trial court erred in dismissing Mrs. Roche's timely suit filed separately from the earlier filed employer suit. Her suit should not have been dismissed, be it with or without prejudice.

We are mindful that our holding in this case coupled with the incongruity of R.S. 23:1101's recognition of rights of both the employer and the employee, and R.S. 23:1002's provision for permissible intervention may result in multiple lawsuits involving single claims. Because in the instant case both the employer and the employee's claims were timely filed

in the same district court (the Fifteenth Judicial District Court), consolidation of the two lawsuits and treatment of the employer's action as an intervention will solve the problem in this case.[4]

And while we are tempted to prescribe a procedural solution in the situation in which two lawsuits are filed in two different courts, each of proper venue,[5] we conclude that such resolution would be dicta here and legislative in nature. It is therefore best left to the Legislature to solve this problem.[6]

Decree

For the foregoing reasons the judgments of the district court and the Court of Appeal are affirmed insofar as they dismissed the action brought on behalf of the minor children; the judgments of the district court and the Court of Appeal dismissing Mrs. Roche's action and requiring her to intervene in the previously filed lawsuit of Liberty Mutual are reversed and the two lawsuits No. 40,722 and No. 40,732 in the Fifteenth Judicial District Court are ordered consolidated. The case is remanded to the district court for further proceedings consistent with this opinion.

JUDGMENTS AFFIRMED IN PART; REVERSED IN PART; REMANDED.

X X X

Footnote 4

Consolidation of two separate suits involving a common issue of law or fact pending in the same court is provided under Article 1561 of the Code of Civil Procedure:

> "When two or more separate suits involving a common issue of law or fact are pending in the same court, the court, at any time prior to trial, may order the consolidation of the suits for trial or may order a joint trial of any of the common issues."

Footnote 5

For instance one solution might be to provide that where the employer's statutory claim for compensation reimbursement is first filed, a suit filed by the employee within the prescriptive period in a court of proper venue shall not be subject to being dismissed on exceptions and shall not be affected by the disposition of the employer's suit. The employer's earlier filed suit in this latter instance might, however, be subject to being transferred and consolidated with the employee's suit as though it

Footnote 5 continued at page 12

Footnote 6 appears at page 12

Footnote 5 continued

were an intervention. For a comparable provision to transfer from one district court to another see Article 123 Code of Civil Procedure.

Footnote 6

The problem is caused by R.S. 1101's recognition of distinct claims of the employer and the employee arising out of a single accident and R.S. 1102's provision that either the employer or the employee may rather than must intervene in the earlier filed lawsuit.

SUPREME COURT OF LOUISIANA

NO. 65,285

ALICE C. ROCHE, ET AL

V.

BIG MOOSE OIL FIELD TRUCK SERVICE, ET AL

MARCUS, Justice (concurring)

In my view, it is inconsistent to hold that, if an employee files suit for damages against a third party tort feasor, an employer seeking reimbursement of compensation must intervene in the pending lawsuit, yet where an employer files suit first, the employee may still file a separate action for damages and need not intervene in the employer's pending suit. Accordingly, I respectfully concur.

FEB 15 1980

SUPREME COURT OF LOUISIANA

NO. 65,285

ALICE C. ROCHE, ET AL.

VERSUS

BIG MOOSE OIL FIELD TRUCK SERVICE, ET AL.

DENNIS, Justice, dissenting in part and concurring in part.

I respectfully dissent from the majority's opinion that the children have no cause of action.

I question whether 2315's listing of wrongful death beneficiaries is exclusive thereby denying these children recovery. In the case of King v. Cancienne, 316 So.2d 366 (La. 1975) we held that a putative spouse would not be deprived of recovery under 2315 for the wrongful death of her putative husband even though she did not technically fit within any of the categories of 2315. As a partial basis for the decision, Justice Barham outlined the history of wrongful death in Louisiana and in France. He noted that "Under French law . . . any person suffering from the loss or disappearance of the victim by death has an independent right of action for his own loss." King, supra, 316 So.1d at 368. He observed:

> "Our Article 2315 is drawn directly from French law . . . . The purpose of that provision in France and in Louisiana was to provide an action for personal damage resulting from the death of another through the delictual action of a third party. The legal right and cause of action of one injured by loss

> of economic aid or love and affection was independent of any action which the deceased might have had . . . . " King, supra, 316 So.2d at 369.

In King, the issue of whether the listing of beneficiaries in 2315 is exclusive or illustrative was recognized but not addressed. It has been long held that the article must be strictly construed and that, therefore, the listing must be exclusive. See Chatman v. Martin, 245 So.2d 423 (La. App. 2d Cir. 1971) and the authorities cited therein. However, the basis for this ruling is faulty. While in France the wrongful death action was recognized, the Common Law of England maintained that the death of a human being did not create a cause of action on behalf of a living person injured because of the death. However, in 1846 Lord Campbell's act was passed giving such a cause of action in limited circumstances. This provision being statutory law, it was in derogation of the common law and as such fell under the rule of requiring strict construction. Johnson, Death on the Callais Coach: The Mystery of Louisiana Wrongful Death and Survival Actions, 37 La. L. Rev. 1, 4-6 (1976). However, our legal background and traditions are civilian. As Professor Johnson astutely commented,

> "Article 2315 is not in derogation of common law; it is not in derogation of anything. There was no reason at all to adopt the common law maxim of strict interpretation of statutes which departed from the common law. And yet, for years and years, the Louisiana jurisprudence has confidently concluded that the article has to be strictly construed, when in fact there is no reason to interpret the article in a different fashion from any other article or statute." Johnson, supra, 37 La. L. Rev. at 7.

Because of the wrongful act of another of the children in the present case were injured. They were deprived of support, love and affection, and of a father. Although they may not fit technically within any of the

present categories of 2315 I believe that an examination of the purpose of the statute would require that person who caused the damage to repair it.

Moreover, the majority's interpretation of Article 2315 renders it unconstitutional.

Although I appreciate the difficulty in conceptualizing a class including the children, it seems to me that dependent minors undergoing virtually certain adoption, absent the death of the adoptive parent, do form a legitimate category deserving of equal protection of the laws—at least as deserving as independent major illegitimate children who may have never known their deceased parent. If the majority's interpretation of Article 2315 is correct, it arbitrarily, capriciously or unreasonably discriminates against the prospective adopted children because of their birth, La. Const. Art. 1, § 6, there being no rational basis to support such discrimination.

I join fully in the balance of the majority opinion.

* * *

Supreme Court of Louisiana

NEW ORLEANS, 70112

On the 7th day of April, 1980, the following action was taken by the Supreme Court of Louisiana in the cases listed below:

REHEARING GRANTED:

64,987 State v. James C. Williams
delaHoussaye, J.ad hoc takes no part.

REHEARINGS DENIED:

65,325 Nash v. Knobloch, et al
DIXON, C.J., CALOGERO & DENNIS, would grant a rehearing.

65,439 State v. McIntyre
DENNIS, J., would grant a rehearing.

65,285 Roche, et al v. Big Moose Oil Field Truck Service, et al
DENNIS, J., would grant a rehearing.

65,342 State v. Russel

64,974 First National Bank of Crowley v. Green Garden Processing, et al
CALOGERO, DENNIS, & WATSON, J.J., would grant a rehearing.

65,231 State v. Bell
MARCUS, BLANCHE, J.J. & delaHoussaye, J.,ad hoc would grant a rehearing.

63,142 Cleco v. Louisiana Public Service Commission
(2 applications)

65,647 State v. Morman
CALOGERO & DENNIS, J.J., would grant a rehearing.
WATSON, J., would grant for the reasons assigned.

64,875 State v. Simmons
CALOGERO, J., would grant a rehearing for the reasons expressed in his dissent.
DENNIS, J., would grant a rehearing.

65,614 State v. Humphrey
DENNIS, J., would grant and assigns reasons.
DIXON, C.J. & CALOGERO J. concur in the denial; they would grant except that the other offenses may be relevant to overcome a defense of accident.

65,767 Gulf States Utilities v. LPSC

65,628 State v. Jones

65,179 State v. Lukefahr, et al
WATSON, J., would grant a rehearing.

65,635 May v. Market Insurance Co., et al

65,744 State v. Tomasetti

65,765 State v. Albert

65,813 State v. Johnson
CALOGERO & DENNIS, J.J., would grant a rehearing.

65,833 State v. Williams

66,024 League of Women Voters v. City of New Orleans
DIXON, C.J. & DENNIS, J., would grant a rehearing.

64,328 Kaplan v. University Lake Corp., et al

(continued)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No.

ALICE C. ROCHE, ET AL, Appellant,

V.

BIG MOOSE OIL FIELD TRUCK SERVICE, ET AL, Appellee

Appeal from the Supreme Court of Louisiana

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that ALICE C. ROCHE, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Louisiana dismissing the wrongful death cause of action on behalf of her minor children entered in this action on February 15, 1980 and rehearing denied on April 7, 1980.

This appeal is taken pursuant to 28 USC Section 1257(2).

SHELTON AND LEGENDRE
ATTORNEYS AT LAW
812 Johnston Street
Post Office Box 52548
Lafayette, Louisiana 70505

BY: THOMAS F. PORTER, IV

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 79-6630

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ALICE C. ROCHE, ET AL, Appellant,

V.

BIG MOOSE OIL FIELD TRUCK SERVICE, ET AL, Appellee

Appeal from the Supreme Court of Louisiana

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Appellant, ALICE C. ROCHE, moves the Court for an order permitting her to proceed in this Court, in forma pauperis, with her appeal from the judgment of the Supreme Court of the State of Louisiana entered in this cause on February 15, 1980, and rehearing denied on April 7, 1980, pursuant to the provisions of Title 28, United States Code, Section 1915, and Rule 53 of the Rules of this Court, and in support thereof attaches the affidavit of said appellant.

Appellant's statement as to jurisdiction is being filed with this motion and appellant's affidavit.

SHELTON AND LEGENDRE
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THOMAS F. PORTER, IV
812 Johnston Street
Post Office Drawer 52548
Lafayette, Louisiana 70505

Attorneys for Appellant

Thomas Robert Shelton
THOMAS ROBERT SHELTON

Thomas F. Porter
THOMAS F. PORTER, IV

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No.

ALICE C. ROCHE, ET AL, Appellant,

V.

BIG MOOSE OIL FIELD TRUCK SERVICE, ET AL, Appellee

AFFIDAVIT OF ALICE C. ROCHE

United States of America :
State of Louisiana :
Parish of Lafayette :

ALICE C. ROCHE, being duly sworn, deposes and says:

1. I am a citizen of the United States and the plaintiff in the above-entitled action on behalf of my minor children.

2. I desire to prosecute an appeal from the judgment entered by the Supreme Court of the State of Louisiana, on February 15, 1980, and rehearing denied on April 7, 1980, pursuant to 28 U.S.C. Sec. 1257(2), but because of my poverty I am unable to pay the costs of such appeal or give security therefor and still be able to provide myself and my dependents with the necessities of life.

3. I believe that I am entitled to the redress I seek by such an appeal, and that such an appeal presents substantial federal questions.

The nature of the questions to be presented upon such appeal is as follows:

Whether LSA - Civil Code Article 2315, which deprives individuals of the right to recover for the wrongful death of another individual on whom they were totally dependent for their subsistence, violates the Equal Protection Clause of the Fourteenth Amendment.

I contend that the Supreme Court of the State of Louisiana erred in holding that the denial of a right of action on behalf of the two minor children for the wrongful death of Joseph D. Roche, pursuant to LSA - Civil Code Article 2315, was not discriminatory or unconstitutional.

WHEREFORE, affiant prays that she may have leave to proceed in this Court on appeal in forma pauperis.

Alice C. Roche

ALICE C. ROCHE

SWORN TO AND SUBSCRIBED before me this 12th day of May, 1980.

Norman J. Roche

NOTARY PUBLIC

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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

NO. 79-6630

ORIGINAL COPY

ALICE C. ROCHE, ET AL, Appellant

v.

BIG MOOSE OIL FIELD TRUCK SERVICE, ET AL, Appellee

MOTION TO DISMISS OR AFFIRM ON BEHALF OF BIG MOOSE OIL FIELD TRUCK SERVICE AND RELIANCE INSURANCE COMPANY

PLAUCHE, SMITH, HEBERT & NIESET
JAMES R. NIESET
1123 Pithon Street
P. O. Drawer 1705
Lake Charles, LA 70602

NO. 79-6630

SUPREME COURT OF THE UNITED STATES

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BRIEF TO THE SUPREME COURT, EXHIBIT "B"

MAY IT PLEASE THE COURT:

BIG MOOSE OILFIELD TRUCK SERVICE and RELIANCE INSURANCE COMPANY move this honorable court to dismiss the appeal, or to affirm the decision below, on the grounds that the questions on which the decision of the cause depends are not such as to require further argument in this Court, and do not present any substantial federal question for review.

STATEMENT OF THE CASE

This lawsuit arises from the death of J.D. Roche on September 3, 1975. Appellant is his widow, Alice C. Roche. She filed suit for herself and for two minors, Dawn Rachelle Robinson and William Donald Robinson, whom she has adopted since her husband's death.

In the lawsuit, plaintiff alleged that she was entitled to recover wrongful death benefits under the Louisiana Wrongful Death Statute for herself and the two minors. The claims of the minors were rejected by the trial court because they were not children of the deceased at the time of his death. He was not their biological father and had never adopted them. The trial court held that the provisions of the Louisiana Wrongful Death Statute, contained in Article 2315 of the Louisiana Civil Code, apply only to biological children of the deceased, and not to others who may be in the process of being adopted by him. Implicit in that holding was a re-affirmation of the traditional legal view that children do not become children by adoption of the adopting parent until the adoption is complete.

The decision of the trial court was affirmed by the Third Circuit Court of Appeal in the State of Louisiana and by the Louisiana Supreme Court.

Appellant takes the position that the application of Article 2315 in this case deprives "minor children" of constitutionally protected rights, citing the decision of this court in Levy v. Louisiana, 88 S. Ct. 1509 (1968). In fact, appellant's whole argument is based on the idea that denial of wrongful death rights to someone dependent on the decedent, is somehow unconstitutional.

A distinction must be drawn between Levy and this case, and the distinction is obvious. In Levy, and related cases, the children were in fact children of the decedent. That is not the case here.

This case deals with minors who were in the process of being adopted by the decedent at the time of his death. The adoption was not final. The children had not become his children.

This is not a case where discrimination takes place against one class of biological children of the deceased as opposed to another class. Rather, this case is a re-affirmation of the traditional rules dealing with adoption, that is, that adoption is not complete until the final decreee. This is not a case of a "finally carved distinction." Rather, it involves a simple matter of determining when a child becomes adopted. Obviously adoption, just as marriage and divorce, must begin at some point. Until that point is passed, the legal rights which flow from adoption do not take hold. That point had not been passed here, and the legal rights which would flow from adoption under the statute can not flow in this case.

What appellant would have this court do is re-write the Louisiana Wrongful Death Statute to substitute the word "dependent" for the word "child". That is not the function of this court.

The application of Article 2315 in this case is uniform and non-discriminatory. Traditional and well-settled legal principles were applied in reaching it. This is not a substantial federal question requiring review by this court.

Appellant attaches to this motion copies of its brief to the Louisiana Supreme Court and to the Third Circuit Court of Appeal. Those briefs review in detail the specific Louisiana authority applicable in this case.

CONCLUSIONS

This is not a case of denial of federally protected rights. It is a case in which well-settled principles of adoption were applied to determine that minors were not adopted by the decedent prior to his death. That is a uniform and non-discriminatory rule.

Since the minors were not adopted by the deceased prior to his death, they could not be his children under the terms of the statute. That statute was applied in a non-discriminatory fashion in this case. It operates to allow the wrongful death recovery to any child, biological or adopted, of the deceased. It operates to deny those rights to anyone not a child of the deceased, regardless of how dependent he might have been on the deceased. The test applied under the statute, in a uniform and non-discriminatory manner, is the parent-child relationship, not a dependency relationship. No matter how much plaintiff might wish it otherwise, the application of that statute does not unconstitutionally deny the minors in this case any rights to which they are entitled. The law simply does not allow recovery for wrongful death under the statute to dependents who are not children of the deceased. The appeal should be dismissed, or the decision of the Louisiana

Supreme Court affirmed.

Respectfully Submitted,

PLAUCHE, SMITH, HEBERT & NIESET

BY: James R. Nieset

JAMES R. NIESET
P. O. Drawer 1705
Lake Charles, LA 70602

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

NO. 6988

ALICE C. ROCHE, ET AL

Plaintiff - Appellant

VERSUS

BIG MOOSE OIL FIELD TRUCK SERVICE, ET AL.

Defendant - Appellee

APPEAL FROM THE
FIFTEENTH JUDICIAL DISTRICT COURT FOR
THE PARISH OF ACADIA

NO. 40,722

HONORABLE DOUGLAS J. NEHRBASS, JUDGE

ORIGINAL BRIEF ON BEHALF OF RELIANCE INSURANCE COMPANY AND BIG MOOSE OIL FIELD TRUCK SERVICE

Defendant - Appellee

PLAUCHE, SMITH, HEBERT & NIESET
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Lake Charles, LA 70602
Attorney for Defendant - Appellee

NO. 6988

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

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STATEMENT OF MATERIAL FACTS

This lawsuit arises from the death of J. D. Roche on December 3, 1975. Appellant is his wife, Alice C. Roche, who filed suit individually and on behalf of the minors Dawn Rachelle Robinson and William Donald Robinson.

Appellant's claims on behalf of the minors were rejected by the trial court because they were not children of the deceased at the time of his death since he was not their biological father and had not adopted them. She was also required to intervene in the tort suit previously filed by her husband's employer's workman's compensation insurer in order to assert her own claims.

Insofar as the rejection of the wrongful death claims sought to be asserted on behalf of the minors, the only truly material facts on this appeal are the dates showing that the minors were not adopted children of the deceased at the time of his death, those being the date of petition for adoption, November 19, 1975; the date of death, December 3, 1975; and the date of adoption of the minors by Alice C. Roche, individually, January 5, 1976. However, since Appellant discusses the whole adoption process in her brief, the following chronology is presented.

Those minor children were placed in the home of J. D. and Alice Roche by the Louisiana Department of Health and Human Resources, as abandoned children, on April 21, 1972. (Plaintiff's brief, p. 4). A petition for their adoption was filed on November 19, 1975. (Tr. p. 23). The order attached to the petition for adoption, which has been introduced in the record and is found as cited above, set a hearing on the petition for adoption for January 5, 1976.

J. D. Roche died on December 3, 1975. On December 2, 1976, Liberty Mutual Insurance Company, the workmen's compensation carrier for J. D. Roche's employer at the time of his death, filed suit to recover compensation benefits. That suit, entitled "Liberty Mutual Insurance Company vs. Reliance Insurance Company, Big Moose Oil Field Truck Service, Inc., and Gardner Lacombe", bears number 40,722 on the docket of the 15th Judicial District Court, Parish of Acadia. One day later, on December 3, 1976, Alice C. Roche filed this suit entitled "Alice C. Roche v. Big Moose Oil Field Truck Service, Inc., et al.", which bears number 40,732 on the docket of the 15th Judicial District Court.

Preemptory exceptions raising the objections of no cause of action and no right of action were filed on behalf of Big Moose Oil Field Truck Service, Inc., and Reliance Insurance Company on the grounds that plaintiff should have intervened in the suit filed by Liberty Mutual and that there were no claims on behalf of the minors, William Donald Robinson and Dawn Rachelle Robinson for the wrongful death of J. D. Roche, since they were not his children. From a judgment maintaining those exceptions, Alice Roche has brought this appeal.

REPLY TO APPELLANT'S SPECIFICATIONS OF ERROR

Appellee will respond to Appellant's specifications of error in inverse order since her second specification can be discussed more briefly.

REPLY TO APPELLANT'S SPECIFICATIONS OF ERROR NUMBER II

Appellant complains of being required to intervene in the suit filed by Liberty Mutual instead of being able to prosecute her own action.

The basis of the requirement that she intervene is set forth by the trial judge in his Reasons for Judgment

(Tr. p. 24, 25). The provisions of Louisiana Revised Statutes 23:1102 allow the employee (or one suing on his behalf) or the employer, to intervene in a suit filed by the other against a third-party.

The Louisiana Supreme Court has held unequivocally that the cited statute requires intervention. In National Surety Corp. v. Standard Acc. Ins. Co., 247 La. 905, 175 So2d 263 (Sup.Ct. 1965), the Court said:

> "L.S.A.R.S. 23:1101, 23:1102, 23:1103, supra, do not set forth whether the injured employee or employer or the employer's insurer shall sue first; when one files suit, however, the other, if he desires recovery must intervene." (Emphasis added).

Appellant has not cited a single case which questions that holding by the Court interpreting those sections of the workmen's compensation statute, and research by Appellee discloses no cases questioning that holding.

Plaintiff suggests that the case of Allstate Ins. Co. v. Louisiana Gas Service Co., 344 So2d 386 (La.App. 4th Cir., 1977) restricts the holding in National Surety to prescription cases. That is not correct. Allstate was not a workmen's compensation case and dealt only with a prescription issue which was similar to a prescription issue discussed in National Surety. The Court in no way restricted, modified or questioned the language of National Surety regarding the procedure to be followed for intervention in a tort suit against a third-party.

When suit was filed by Liberty Mutual Insurance Company under Docket No. 40,722, 15th Judicial District Court, on December 2, 1976, Appellant was required to intervene in that lawsuit to assert her claims against the third party. Her suit, filed one day later, was not proper. The trial judge correctly granted the exception, requiring her to intervene in the suit previously filed by the workmen's compensation insurer.

REPLY TO APPELLANT'S SPECIFICATION OF ERROR NUMBER I

Appellant urges this Court to permit her to bring suit for the wrongful death of her husband, not only for herself, but on behalf of the minor children who were not adopted by her or by the decedent at the time of his death. Her claim is without legal merit.

Recovery for wrongful death is provided by Article 2315 of the Louisiana Civil Code. In pertinent part, that article provides:

> "The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children . . .
>
> * * *
>
> "As used in this article, the words 'child', 'brother', 'sister', 'father', and 'mother' include a child, brother, sister, father, and mother, by adoption, respectively."

Since the minor children were never adopted by J. D. Roche, they are not children by adoption in order to permit wrongful death recovery to them for his death.

This Court had an occasion to consider virtually the identical legal problem, in a slightly different factual context, in the case of Bertrand v. State Farm Fire & Casualty Co., 333 So2d 322 (La.App. 3rd Cir. 1976). There the decedent was the child and the question was who was entitled to the action for his wrongful death; the "parents" who had petitioned for adoption, or the "natural parents". Even though a petition for adoption had been filed and an Interlocutory Decree had been rendered, this Court found that the "natural parents" were entitled to the action, since the adoption had

not been finalized so as to make the decedent an "adopted child" within the provisions of Article 2315. There is absolutely no reason why the same rule should not apply in this case.

Appellant suggests that her good faith compliance with adoption procedures, and the fact that the children were dependent on her husband, should somehow change the well-established legal rule, and permit wrongful death recovery on behalf of the children, even though they were not adopted at the time of the alleged wrongful death.

Appellant suggests that she and her husband had moved with all dispatched to secure the adoption of the children, and that the untimely death of Mr. Roche occurred only two days before the adoption could have been finalized. The record, however, reflects otherwise.

The children were placed in Appellant's home on April 21, 1972. A petition for their adoption was not filed until November 19, 1975. Adoption was sought under the provisions of Louisiana Revised Statutes 9:434, the procedure permitting a final decree to be granted at the first hearing where the child has been placed in the home by an agency and has resided in the home for at least six months. These children had resided in the Roche home for two years and seven months before the petition for their adoption was filed.

The order attached to the petition filed November 19, 1975, (Tr., p. 23), shows that at the time the petition was filed on November 19, 1975 a hearing was set for January 5, 1976. Appellant suggests in her brief that a hearing on the adoption could have been had within fifteen (15) days of service, suggesting further that the hearing could have come only two days after the date Mr. Roche died. That

is not correct. Revised Statutes 9:428 provides impertinent part as follows:

> "The court shall set a time and place for the hearing of the petition not less than thirty nor more than sixty days after completion of service of process."

Even if service of process on all required parties could have been made the day the petition was filed, the earliest date which a hearing could have been set was December 19, 1975.

Plaintiff's argument that this is a case in which decedent's death prevented by only a very few days an adoption which otherwise would have taken place is not substantiated by the record.

Appellant also suggests that the dependency of the two children on the deceased should be considered in determining their right to recover for his wrongful death. In support of that position, Appellant cites a number of cases in which illegitimate children, natural children, and posthumous children have been allowed wrongful death recovery under the provisions of Article 2315.

In each of those cases, the child allowed recovery bore a legal parent-child relationship to the deceased. That is precisely the distinction between those cases and this one. Here, the legal relationship did not exist because the adoption was not granted during decedent's lifetime.

The provisions of Article 2315 permitting wrongful death recovery in favor of the successive classes are strictly construed. One must be a member of the class in whose favor the right survives in order to recover. This has been held, not only in the case of adoption, as in Bertrand, but also in the case of marriage.

In Clark v. Tenneco, Inc., 353 So2d 418 (La.App. 4th Cir. 1978), the question was whether wrongful death

recovery should lie in favor of a wife, who had been separated from the deceased for over two years without a legal separation having been granted, or his parents, with whom he had lived for at least two years preceding his death. The Court held the wife entitled to recover since the marriage relationship never had been legally terminated. The Court also recognized the fact that the equitable considerations in favor of the parents over the separated wife should not be permitted to affect recovery, saying:

> "Appellant correctly concedes that where there is specific law, there is no remedy in equity under Louisiana Civil Code Article 21."

In our situation, too, there is specific law. Wrongful death recovery in favor of "the surviving spouse and child or children of the deceased" is extended to "children . . . by adoption". Although a petition for adoption had been filed, as had a petition for separation in the Clark case, the adoption was not finalized and the children were not children by adoption of J. D. Roche at the time of his death. In fact, they were never children by adoption of J. D. Roche.

For an adoption to be legally effective, all formal requisites must be strictly complied with. Our Supreme Court so held in Roy v. Speer, 249 La 1034, 192 So2d 554 (Sup. Ct. 1966), where the Court said:

> "Although adoption prevailed among Biblical ancients and other civilizations of antiquity; had reached a high level of development by Justinian times, to whose institutes our civil law is traceable; and was known early in Louisiana under Spanish law, it was never considered an inherent right here and, after Louisiana became a state, it was specifically abolished by the civil codes of 1808 and 1825.

> Adoption was not permitted in this state, therefore, until, following specific authorization in the Constitution of 1864, Act 48 of 1865 was passed, any adoption prior thereto being only on an individual basis and effected through a specific legislative act. As stated in Green v. Paul, 212 La. 337, 31 So2d 819, 'It has been firmly settled by this court that adoption is a creature of statute; that, this being so, it is only what the law makes it and that, to establish the relation, the statutory requirements must be strictly carried out, otherwise, the adoption is a nullity.' See, also, Succession of Gambino, 225 La. 674, 73 So.2d 800; Madere v. Long, 231 La. 498 91 So.2d 771; In re Ackenhausen, 244 La. 730, 154 So.2d 380, and the authorities therein cited."

Absent compliance with the legal formalities, there can be no adoption. The minors here never became children by adoption of J. D. Roche, and cannot recover for his alleged wrongful death.

Having discussed plaintiff's essentially equitable arguments in favor of allowing recovery on behalf of the minor children even though they were not adopted children at the time of the death of J. D. Roche, we refer back to the Bertrand case. There, a petition for adoption had been filed and an Interlocutory Decree of adoption had been rendered. The final decree was pending but had not been secured. Under those circumstances, the Court still held that the final decree of adoption was an absolute requirement to create the status of adopted child to permit 2315 recovery.

> "We conclude that since the final decree of adoption had not been granted, Mr. and Mrs. Bertrand, Sr. were not the mother and father of the child 'by adoption' within the meaning of LSA - C.C. Art. 2315, and they have no right of action for the child's death."

If the parents by adoption have no right of action for the wrongful death of the child where the adoption is not complete, certainly the child whose adoption is not

complete has no right of action for the wrongful death of the parent.

CONCLUSIONS

When either the employer or the employee files a tort suit against a third party, the other must intervene in that suit to assert his rights, not file a separate suit. The exception raising that procedural defect in plaintiff's original petition was properly maintained by the trial judge.

Article 2315 of the Louisiana Civil Code permits recovery for wrongful death only to children of the deceased. Since the minors were not the natural or biological children of J. D. Rocho, they could have become his children only by adoption. While the adoption process was begun before his death, it was not finalized and he never adopted them. They have no claim for his wrongful death and the exception was correctly maintained by the District Court.

Respectfully submitted,

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SUPREME COURT OF LOUISIANA

DOCKET NO. 65,285

ALICE C. ROCHE, ET AL.

versus

BIG MOOSE OIL FIELD TRUCK SERVICE, ET AL.

WRIT OF REVIEW TO THE COURT OF APPEAL,
THIRD CIRCUIT
STATE OF LOUISIANA

ORIGINAL BRIEF ON BEHALF OF DEFENDANTS-APPELLEES, BIG MOOSE OIL FIELD TRUCK SERVICE and RELIANCE INSURANCE COMPANY

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SUPREME COURT OF LOUISIANA

DOCKET NO. 65,285

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STATEMENT OF FACTS

This lawsuit arises from the death of J. D. Roche on December 3, 1975. Appellant is his wife, Alice C. Roche, who filed suit individually and on behalf of the minors Dawn Rachelle Robinson and William Donald Robinson.

Applicant's claims on behalf of the minors were rejected by the trial court because they were not children of the deceased at the time of his death since he was not their biological father and had not adopted them. She was also required to intervene in the tort suit previously filed by her husband's employer's workman's compensation insurer in order to assert her own claims.

Insofar as the rejection of the wrongful death claims sought to be asserted on behalf of the minors, the only truly material facts on this appeal are the dates showing that the minors were not adopted children of the deceased at the time of his death, those being the date of petition for adoption, November 19, 1975; the date of death, December 3, 1975; and the date of adoption of the minors by Alice C. Roche, individually, January 5, 1976. However, since Appellant discusses the whole adoption process in her brief, the following chronology is presented.

Those minor children were placed in the home of J. D. and Alice Roche by the Louisiana Department of Health and Human Resources, as abandoned children, on April 21, 1972.

(Plaintiff's brief, p. 4). A petition for their adoption was filed on November 19, 1975. (Tr. p. 23). The order attached to the petition for adoption, which has been introduced in the record and is found as cited above, set a hearing on the petition for adoption for January 5, 1976.

J. D. Roche died on December 3, 1975. On December 2, 1976, almost one year later, Liberty Mutual Insurance Company, the workmen's compensation carrier for J. D. Roche's employer at the time of his death, filed suit to recover compensation benefits. That suit, entitled "Liberty Mutual Insurance Company v. Reliance Insurance Company, Big Moose Oil Field Truck Service, Inc., and Gardner Lacombe", bears number 40,722 on the docket of the 15th Judicial District Court, Parish of Acadia. One day later, on December 3, 1976, Alice C. Roche filed this suit entitled "Alice C. Roche v. Big Moose Oil Field Truck Service, Inc., et al.", which bears number 40,732 on the docket of the 15th Judicial District Court.

Preemptory exceptions raising the objections of no cause of action and no right of action were filed on behalf of Big Moose Oil Field Truck Service, Inc., and Reliance Insurance Company on the grounds that plaintiff should have intervened in the suit filed by Liberty Mutual and that there were no claims on behalf of the minors, William Donald Robinson and Dawn Rachelle Robinson for the wrongful death of J. D. Roche, since they were not his children. From a judgment maintaining those exceptions, Alice Roche has brought this appeal.

OBJECTION TO APPELLANT'S
ARGUMENT ON ASSIGNMENT OF ERROR I -
"RIGHT OF ACTION OF THE MINOR CHILDREN"

In her argument on the right of action of the minor children, plaintiff refers to the contract entered into between herself and the Department of Public Welfare, specifically quoting language from that contract and relying on it in her argument on her duty to support the minor children.

The contracts referred to have not been introduced in evidence and are not part of the record in this case. Appellees have not had a chance to review those contracts. Appellees vigorously oppose to any reference to those documents since they are not in the record and to any part of Appellant's argument based on those documents. For that reason, Appellees urge the Court to reject entirely the "contractual obligation" section of Appellant's arguments, as it is based on documents which do not form part of the record in this case.

REPLY TO APPELLANT'S ARGUMENT ON
ASSIGNMENT OF ERRORS I(A)
CONTRACTUAL OBLIGATION

While, as just stated, the documents which form the basis for the argument in this section are not part of the record, and this entire section should be disregarded by the Court, even if it were to be considered, it would not materially affect the outcome.

Appellant seeks to find some way to convince this Court that Article 2315 of the Louisiana Civil Code means something other than what it says. That article specifically extends the right to recover for wrongful death, a purely statutory recovery, beyond the scope of its terms. The

article very specifically extends the right to recover to certain designated persons. In the case of a spouse and children, the right is extended to the spouse and surviving children, including adopted children. The article very simply makes no provision for children other than children related by blood or by adoption. Since these children were not adopted at the time of the death of Mr. Roche, and since they were not related to him by blood, they are not entitled to recover for his wrongful death under the Wrongful Death Statute no matter what obligation he may have assumed for their support.

Appellant argues the so-called doctrine of "equitable adoption". The doctrine is unrecognized in Louisiana courts. In fact, Appellant cites only two rather old cases from Utah and Nevada in support of the proposition.

In an annotation entitled "Death-Action by or for Adopted Child", found in 94 ALR 2d at p. 37 et seq., the following comment is made:

> "The right of an equitably adopted child to maintain or benefit by an action for the wrongful death of the child's alleged adoptive parent has been almost universally denied, on the theory that if the statutory adoption procedure had not been followed, the child could not be one of those surviving 'children' designated as beneficiaries under the wrongful death act."

That is exactly the argument which Appellees have advanced in this case from the very first filing of the Exception of No Right of Action. Thus the two cases cited by Appellant purporting to favor the doctrine of "equitable adoption" are in a very distinct minority.

It is also noted that in the case of In Re Williams cited by Appellant, the question was not whether the "equitably adopted" child could recover for the wrongful death of the parent, but rather whether he was entitled to a share of the parent's estate. In that case, the contract which created the "equitable adoption", apparently also included a provision requiring the adopting parents to make the child their heir."

In the case of Limbaugh v. Woodall, 121 GA App. 638, 175 SE 2d 135 ( ), the Court specifically held that a child whose adoption was completed after the death of one prospective adoptive parent was not entitled to maintain an action for the wrongful death of that parent. It is exactly the situation facing the court in this case, and the decision of the trial court here was in accordance with that majority rule denying the right to bring a wrongful death action to one not legally related to the decedent and provided a right to recover by the Wrongful Death Statute.

REPLY TO APPELLANT'S ARGUMENT ON
ASSIGNMENT OF ERROR I(B)
"DEPENDENT STATUS"

Appellant argues that the minor children should be allowed a wrongful death recovery because they were dependent on Mr. Roche at the time of his death. Dependency is not, and never has been, the test for recovery for wrongful death under the statute.

At the outset, it is noted that all of the cases advanced by plaintiff purporting to establish a right to recovery on the basis of dependency in fact established the right on the basis of legal relationship.

In our case, the children were neither the biological nor adopted children of J. D. Roche at the time of his death, and have no legal basis on which to claim recovery for his wrongful death. This is not a case of excluding illegitimate children. It is, rather, a case of requiring the legal relationship set forth in the Wrongful Death Statute before allowing recovery under that statute.

REPLY TO APPELLANT'S SPECIFICATION OF ARGUMENT ON ASSIGNMENT OF ERRORS I(C) "POSTHUMOUS CHILDREN"

Appellant argues that the status of William and Dawn Robinson can easily be compared to that of posthumous children. Appellees vigorously dispute that assertion. Posthumous children are blood children of the deceased parent. The parent is biologically and legally responsible for the creation of their life. The law simply chooses to recognize the fulfillment of that relationship by posthumous birth.

In the case of adoption, the children do not become the legal children of the adopting parent until the time of adoption. Prior to that time, they bear him no special legal relationship as children.

In the case of posthumous children, the relationship of parent and child is created at the instant of conception. In the case of adopted children, the relationship of parent and child is created only at the instant of the judgment decreeing the adoption. In the present case, since no such judgment had been signed, there was no legal relationship of parent and child at the time of J. D. Roche, and there can be no recovery for his wrongful death by the Robinson children.

GENERAL REPLY TO APPELLANT'S SPECIFICATION OF ERROR I

Appellant urges this Court to permit her to bring suit for the wrongful death of her husband, not only for herself, but on behalf of the minor children who were not adopted by her or by the decedent at the time of his death. Her claim is without legal merit.

Recovery for wrongful death is provided by Article 2315 of the Louisiana Civil Code. In pertinent part, that article provides:

> "The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of; (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children . . .
>
> * * *
>
> "As used in this article, the words 'child', 'brother', 'sister', 'father', and 'mother' include a child, brother, sister, father and mother, by adoption, respectively."

Since the minor children were never adopted by J. D. Roche, they are not the children by adoption in order to permit wrongful death recovery to them for his death.

The Third Circuit Court had an occasion to consider virtually the identical legal problem, in a slightly different factual context, in the case of Bertrand v. State Farm Fire & Casualty Co., 333 So.2d 322 (La.App. 3d Cir. 1976). There the decedent was the child and the question was who was entitled to the action for his wrongful death; the "parents" who had petitioned for adoption, or the "natural parents".

Even though a petition for adoption, had been filed and an Interlocutory Decree had been rendered, the Third Circuit Court found that the "natural parents" were entitled to the action, since the adoption had not been finalized so as to make the decedent an "adopted child" within the provisions of Article 2315. There is absolutely no reason why the same rule should not apply in this case.

Appellant suggests that her good faith compliance with adoption procedures, and the fact that the children were dependent on her husband, should somehow change the well-established legal rule, and permit wrongful death recovery on behalf of the children, even though they were not adopted at the time of the alleged wrongful death.

Appellant suggests that she and her husband moved with all disptached to secure the adoption of the children, and that the untimely death of Mr. Roche occurred only two days before the adoption could have been finalized. The record, however, reflects otherwise.

The children were placed in Appellant's home on April 21, 1972. A petition for their adoption was not filed until November 19, 1975. Adoption was sought under the provisions of Louisiana Revised Statutes 9:434, the procedure permitting a final decree to be granted at the first hearing where the child has been placed in the home by an agency and has resided in the home for at least six months. These children had resided in the Roche home for two years and seven months before the petition for their adoption was filed.

The order attached to the petition filed November 19, 1975, (Tr. p. 23), shows that at the time the petition was filed on November 19, 1975 a hearing was set for January 5, 1976. Appellant suggests in her brief that a hearing on the adoption could have been had within fifteen (15) days of service, suggesting further that the hearing could have come only two days after the date Mr. Roche died. That is not correct. Revised Statute 9:428 provides in pertinent part as follows:

> "The court shall set a time and place for the hearing of the petition not less than thirty nor more than sixty days after completion of service of process."

Even if service of process on all required parties could have been made the day the petition was filed the earliest date which a hearing could have been set was December 19, 1975.

Appellant's argument that this is a case in which decedent's death prevented by only a very few days an adoption which otherwise would have taken place is not substantiated by the record.

Appellant also suggests that the dependency of the two children on the deceased sould be considered in determining their right to recover for his wrongful death. In support of that position, Appellant cites a number of cases in which illegitimate children, natural children, and posthumous children have been allowed wrongful death recovery under the provisions of Article 2315.

In each of those cases, the child allowed recovery bore a legal parent-child relationship to the deceased. That is precisely the distinction between those cases and this one. Here, the legal relationship did not exist because the adoption was not granted during decedent's lifetime.

The provisions of Article 2315 permitting wrongful death recovery in favor of the successive classes are strictly construed. One must be a member of the class in whose favor the right survives in order to recover. This has been held, not only in the case of adoption, as in Bertrand, but also in the case of marriage.

In Clark v. Tenneco, Inc., 353 So.2d 418 (La.App. 4th Cir. 1978), the question was whether wrongful death recovery should lie in favor of a wife, who had been separated from the deceased for over two years without a legal separation having been granted, or his parents, with whom he had lived for at least two years preceding his death. The Court held the wife entitled to recover since the marriage relationship never had been legally terminated. The Court also recognized the fact that the equitable considerations in favor of the parents over the separated wife should not be permitted to affect recovery, saying:

> "Appellant correctly concedes that where there is specific law, there is no remedy in equity under Louisiana Civil Code Article 21."

In our situation, too, there is specific law. Wrongful death recovery in favor of "the surviving spouse and child or children of the deceased" is extended to

"children . . . by adoption". Although a petition for adoption had been filed, as had a petition for separation in the Clark case, the adoption was not finalized and the children were not children by adoption of J. D. Roche at the time of his death. In fact, they were never children by adoption of J. D. Roche.

For an adoption to be legally effective, all formal requisites must be strictly complied with. This Court so held in Roy v. Speer, 249 La. 1034, 192 So.2d 554 (Sup. Ct. 1966), where the Court said:

> "Although adoption prevailed among Biblical ancients and other civilizations of antiquity; had reached a high level of development by Justinian times, to whose institutes our civil law is traceable; and was known early in Louisiana under Spanish law, it was never considered an inherent right here and, after Louisiana became a state, it was specifically abolished by the civil codes of 1808 and 1825. Adoption was not permitted in this state, therefore, until, following specific authorization in the Constitution of 1864, Act 48 of 1865 was passed, any adoption prior thereto being only on an individual basis and effected through a specific legislative act. As stated in Green v. Paul, 212 La. 337, 31 So.2d 819, 'It has been firmly settled by this court that adoption is a creature of statute; that, this being so, it is only what the law makes it and that, to establish the relation, the statutory requirements must be strictly carried out, otherwise, the adoption is a nullity.' See, also, Succession of Gambino, 225 La. 674, 73 So.2d 800; Madere v. Long, 231 La. 498 91 So.2d 771; In re Ackenhausen, 244 La. 730, 154 So.2d 380, and the authorities therein cited."

Absent compliance with the legal formalities, there can be no adoption. The minors here never became

children by adoption of J. D. Roche, and cannot recover for his alleged wrongful death.

Having discussed plaintiff's essentially equitable arguments in favor of allowing recovery on behalf of the minor children even though they were not adopted children at the time of the death of J. D. Roche, we refer back to the Bertrand case. There, a petition for adoption had been filed and an Interlocutory Decree of adoption had been rendered. The final decree was pending but had not been secured. Under those circumstances, the Court still held that the final decree of adoption was an absolute requirement to create the status of the adopted child to permit 2315 recovery.

> "We conclude that since the final decree of adoption had not been granted, Mr. and Mrs. Bertrand, Sr. were not the mother and father of the child 'by adoption' within the meaning of LSA - C.C. Art. 2315, and they have no right of action for the child's death."

If the parents by adtoption have no right of action for the wrongful death of the child where the adoption is not complete, certainly the child whose adoption is not complete has no right of action for the wrongful death of the parent.

REPLY TO APPELLANT'S SPECIFICATION OF ERROR II - NEED FOR INTERVENTION BY EMPLOYEE

The provisions of Louisiana Revised Statutes 23:1102 allow the employee (or one suing on his behalf) or

the employer, to intervene in a suit filed by the other against a third party.

The Louisiana Supreme Court has held unequivocally that the cited statute requires intervention. In National Surety Corp. v. Standard Acc. Ins. Co., 247 La. 905, 175 So.2d 263 (Sup. Ct. 1965), the Court said:

> "L.S.A.R.S. 23:1101, 23:1102, 23:1103, supra, do not set forth whether the injured employee or employer or the employer's insurer shall sue first; when one files suit, however, the other, if he desires recovery must intervene." (Emphasis added).

Appellant has not cited a single case which questions that holding by the Court interpreting those sections of the workmen's compensation statute, and research by Appellee discloses no cases questioning that holding.

Plaintiff suggests that the case of Allstate Ins. Co. v. Louisiana Gas Service Co., 344 So.2d 386 (La.App. 4th Cir., 1977) restricts the holding in National Surety to prescription cases. That is not correct. Allstate was not a workmen's compensation case and dealt only with a prescription issue which was similar to a prescription issue discussed in National Surety. The Court in no way restricted, modified or questioned the language of National Surety regarding the procedure to be followed for intervention in a tort suit against a third party.

When suit was filed by Liberty Mutual Insurance Company under Docket No. 40,722, 15th Judicial District Court, on December 2, 1976, Appellant was required to intervene in that lawsuit to assert her claims against the

third party. Her suit, filed one day later, was not proper. The trial judge correctly granted the exception, requiring her to intervene in the suit previously filed by the workmen's compensation insurer.

REPLY TO APPELLANT'S ARGUMENT ON SPECIFICATION OF ERROR III - VALIDITY OF APPEAL AS TO FRED WILSON DEFENDANTS

Appellees Big Moose Oil Field Truck Service and Reliance Insurance Company are not involved in this specification of error.

CONCLUSIONS

The decision of the District Court requiring Alice Roche to intervene in the tort suit previously filed by the workmen's compensation insurer was in accordance with the provisions of the Workmen's Compensation Act and the interpreting jurisprudence. The rule promotes order and stability. It works no injustice on Appellant in this case and she shows no reasonable basis for it being changed.

Although Appellant has tried valiantly, she can show this Court no legal or blood relationship between her deceased husband and the minor children on whose behalf she seeks to assert a claim for his wrongful death. Such a legal or blood relationship is an absolute prerequisite to an action for wrongful death. The decision of the trial court maintaining the preemptory exception raising the exception of no right of action on that basis, was properly granted and should not be disturbed.

Respectfully submitted,

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OCTOBER TERM, 1980

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NO. 79-6630

ALICE C. ROCHE, ET AL, Appellant

VS.

BIG MOOSE OIL FIELD TRUCK SERVICE, ET AL, Appellees

Appeal from the Supreme Court of Louisiana

Motion to Dismiss or Affirm

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OCTOBER TERM, 1980

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ALICE C. ROCHE, ET AL, Appellant

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Appeal from the Supreme Court of Louisiana

Motion to Dismiss or Affirm

Opinion Below

The Supreme Court of Louisiana issued its opinion in this case on February 15, 1980, and it can be found at 381 So. 2d 396.

Application for rehearing was denied in this case on April 7, 1980, as is noted in the opinion of the Louisiana Supreme Court.

Motion to Dismiss or Affirm

Pursuant to United States Supreme Court Rule 16 (1), Appellee moves the Court to dismiss the appeal herein or in the alternative, to affirm the judgment of the Supreme Court of Louisiana on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A.

The Statute

This appeal raises the constitutionality of the Louisiana "Wrongful Death Statute" (LSA - Civil Code 2315).

The statute provides that certain classes of people may recover damages for the wrongful death of a person who is killed through the fault of another person. The surviving spouse and child or children of the deceased are first entitled to this right. If the deceased left no spouse or child surviving, the surviving father and mother are entitled to recover. Lastly, if the deceased left no spouse, child or parents surviving, the deceased's surviving brothers and sisters are entitled to recover. The statute was amended in 1948 to include adopted children as beneficiaries. The statute was again amended in 1960 to its present form to provide that the word "Child" as used in the statute includes a child "by adoption." As the Louisiana Supreme Court stated, the issue on appeal to this court is whether the word "Child" also includes a child for whom a petition has been filed but whose adoption is not final.

B.

The Proceedings Below

Appellant, Alice C. Roche, and the decedent, Joseph Daniel Roche were married in 1968. They had no children of their own. In 1974 the Juvenile Court for the Parish of Calcasieu decreed William David Robinson and Dawn Rochelle Robinson to be abandoned and awarded custody to the Louisiana Health and Human Resources Administration for placement, in the best interests of the children. The children were placed in the home of Mr.

and Mrs. Roche by virtue of an order of the Fourteenth Judicial District Court, State of Louisiana, dated May 31, 1974. On November 19, 1975, Appellant, Alice C. Roche, and Joseph D. Roche applied for the adoption of the children in the Juvenile Court of Fifteenth Judicial District Court, State of Louisiana. The Division of Family Services filed its confidential report on the adoption request of Mr. and Mrs. Roche on December 19, 1975. Mr. Roche was killed on December 3, 1975, prior to the final decree of adoption on January 5, 1976.

As a result of Joseph D. Roche's death, Appellant, Alice C. Roche, instituted a wrongful death action individually as the natural tutrix of the minor children, who were at the time of filing of the suit, her adopted children. The action was instituted against Appellees pursuant to LSA-Civil Code 2315, the constitutionality of which is attacked herein. Appellees filed an exception as to the right of the two minor children to bring a wrongful death action pursuant to LSA-Civil Code 2315 since the final decree of adoption had not been given prior to the date Joseph D. Roche was killed. The Fifteenth Judicial District Court for the State of Louisiana, sustained this exception and dismissed the actions of the two minor children against Appellees.

This decision was affirmed by the Third Circuit Court of Appeals for the State of Louisiana, which opinion can be found at 371 So. 2d 1374 (1979).

The decision was also affirmed by the Supreme Court of Louisiana, which opinion can be found at 381 So.2d 396 (1980).

II.

ARGUMENT

The Case Presents No Substantial Question Not Previously Decided by This Court

Appellant attacks LSA-Civil Code 2315 on the basis that it arbitrarily, capriciously and unreasonably discriminates against the two hereinabove named minor children and thus does not equally protect them as set forth in the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

As stated by this Court in Weber vs. Aetna Casualty and Surety Company, 92 S.Ct. 1400 (1972), a state legislature is given great latitude in making classifications in the areas of social and economic legislation, and this Court requires that the statutory classification bear some rational relationship to a legitimate state purpose. And, when the state statutory classifications create suspect classes or deal with fundamental rights, this Court will examine the classification with stricter scrutiny. In either case, the essential inquiry is what legitimate state interests the classification promotes and what fundamental personal rights might the classification endanger.

In the instant case, the legitimate state interests which the classification promotes are two-fold. In the first place, Appellant would have every person who is a "dependent" of a person killed through the fault of another have a cause of action under the applicable statute. One reason the Louisiana Legislature chose not to word its Wrongful Death Statute in this manner is the serious problem the Louisiana courts would have in interpreting the word "dependent." For the sake of judicial consistency, the legislature chose to specifically enumerate those classes of people whom it felt should have a cause of action under the statute, instead of leaving the statute open to so much judicial interpretation, which would result with Appellant's theory.

Secondly, the Louisiana Legislature, while providing a cause of action under the statute for an adopted child, realized that an adoption is a creature of a legislative statute and that for the adoption to be valid, each and every of the statutory requirements, as enumerated by the legislature, should be strictly carried out. This was recognized by the Supreme Court of Louisiana in Roy Vs. Speer, 192 So. 2d 554 (La, 1966). Appellee contends that these two state purposes, judicial consistency and strict construction of its adoption law, are legitimate and that the classification in LSA-Civil Code 2315 does bear a rational relationship to the purpose.

Appellant has cited numerous cases wherein illegimate children, natural children and posthumous children have been allowed to recover for the wrongful death of their parent under Article 2315. Appellee concedes this fact, but points out that in these cases it was a blood relation of the decedent that was held to have rights under Article 2315. In the instant case, the children who seek to recover are not related by blood to the decedent but are instead being adopted. For this reason, these cases should be considered distinguishable and inapplicable.

The failure of LSA Civil Code 2315 to recognize as beneficiaries thereunder dependent minors undergoing adoption does not render the statute unconstitutional under the Equal Protection Clause. The classifications set forth in the statute by the Louisiana Legislature bear a rational relationship to several legitimate state purposes.

III.

CONCLUSION

Wherefore, appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Louisiana.

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